UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

INTERSTATE BRANDS CORPORATION

And 1-CA-44198

NEW ENGLAND TEAMSTERS BAKERY DRIVERS COUNCIL, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Kevin J. Murray, Esq., Of Boston, Massachusetts For the General Counsel

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For the Charging Party Union

Leonard Singer, Esq., Of Kansas City, Missouri For the Respondent Employer

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Boston, Massachusetts on April 14 – 16, 2008. The charge in this case was filed by New England Teamsters Bakery Council, a/w International Brotherhood of Teamsters (herein Union) on September 25, 2007. An amended charge was filed on January 25, 2008 and another amended charge was filed on February 14, 2008. The Regional Director for Region 1 issued a Complaint and Notice of Hearing on February 29, 2008. The Complaint alleges, inter alia, that Interstate Brands Corporation (herein Interstate, IBC, Company or Respondent) engaged in activities that violated Section 8(a)(1) and (5) of the National Labor Relations Act (herein Act). Respondent filed a timely Answer denying most of the Complaint allegations, but admitting the jurisdictional allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Counsel for General Counsel, Union and Respondent, I make the following

¹ All dates are in 2007 unless otherwise noted.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is a wholesaler of baked goods with an office and place of business in Biddeford, Maine. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Complaint Allegations

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1. Since prior to Respondent's purchase of a predecessor's business in 1996 and at all times since then, the Union has been the designated exclusive bargaining representative of Respondent's employees in the following described Unit:

All supervisors covered by the "New England Supervisors Agreement," including all supervisors employed out of the Employer's New England facilities (those facilities in Maine, New Hampshire, Vermont, Massachusetts, Connecticut and parts of New York State), including Supervisors, Foremen, Direct Supervisors, or other such Employees who have charge of a certain number of routes, and who perform the functions and duties of a supervisor as such functions and duties are commonly understood, but who may be designated by some other title. The unit excludes those who have the responsibility and obligation to hire and fire, and those who perform no supervisory duties other than route building.

- 2. About September 17, 2007, Respondent reduced the number of unionized division sales managers covered by the New England Supervisors Agreement 2005-2010 contract and transferred the work performed by division sales managers to non-unionized district sales managers.
- 3. On or about September 11, 2007, Respondent, by various agents, at various locations, bypassed the Union and dealt directly with employees in the Unit by informing them that their Union positions were being eliminated, but that if they so chose, they could accept a similar, newly created non-Union position, and that if they failed to make a choice by the next day, they would be considered to have been fired.
- 4. (a) About September 11, 2007, the Union, by Jeffrey Padellaro, orally requested to Joseph Landry that Respondent furnish the Union with the following information: when employees affected by Respondent's conduct set out in paragraph 2 above would receive earnings guarantees.
- (b) About September 12, 2007, the Union, by Jeffrey Padellaro, orally requested to Joseph Cabral and Terry Johnson, that Respondent furnish the Union with the following information: paperwork signed by Unit employees when they were removed from the Unit by Respondent's conduct in paragraph 2 above.
- 5. Since on or about September 12, 2007, Respondent has failed and refused to furnish the Union with the information requested by it in paragraph 4 above.

6. The following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

5 Joseph Landry Area Manager

Joseph Cabral Manager of Human Resources
Jeff Parlato Labor Relations Manager

Ron Daoust Area Manager
Terry Johnson Branch Manager

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- B. Relevant Facts Bearing on the Issues Raised by the Complaint.
- 1. Interstate's New England Operations Pre-September 12, 2007

Interstate produces and sells baked products nationwide under the brand names Wonder Bread, Nissen Bread, Twinkies, Hostess Cupcakes, Drake Cakes, Dolly Madison, Devil Dogs, Home Pride, Cape Cod and other brands. These products are distributed to chain food stores as well as smaller mom and pop food outlets. The Respondent also has company stores where surplus or day old product is sold. Interstate has competition in the New England area including the makers of products under the names Country Kitchen, George Weston and Pepperidge Farms. At all times material to the case, Interstate has sold and delivered its products primarily using route sales representatives. These persons deliver product to customers stores, place product on shelves, remove outdated product and return it to their base. They handle anything that needs to be done with respect to promotions and take orders from customers. Upon the completion of their daily routes, they meet with their supervisor to go over the next order for product, any upcoming promotions or other issues. Until September 12, 2007, the route salespersons' supervisors were called Division Sales Managers. Some of these supervisors are not in the Union and had disciplinary authority, except the authority to hire and fire, and some were Union members in Interstate's supervisors unit and had no disciplinary authority except perhaps to report problems to higher management.

Jeffrey Padellaro is a Business Agent with Teamsters Local 633 and Secretary/Treasurer of the New England Bakery Drivers' Council. This Council bargains, arbitrates and adjudicates grievances for ten local unions in New England and one in New York State. Padellaro, together with the Council's Executive Chairman Dennis Raymond, performs the listed functions on a regular basis. The Council has represented employees of Interstate and its predecessor Continental Baking since the 1950's. Interstate acquired the business in 1993 or 1994. These represented employees were in two bargaining units, one a route sales unit and the other a supervisors unit. Each unit has a collective bargaining agreement with Interstate that was effective from May 2, 2004 until May 5, 2007. The parties agreed to an extension of the ending date of these agreements until August 2010. The current number of employees in the Sales unit is approximately between eight and nine hundred. These employees include, inter alia, route salespersons, over the road tractor trailer drivers, and garage employees, mainly mechanics. The Respondent bases its delivery and other trucks in a variety of locations throughout New England. These locations are called its branches and depots. Sales routes are run from these branches or depots.

As noted above, the Division Sales Managers in some New England locations are members of the Union and in other locations, are non-union. The unionized Division Sales Managers are also called union supervisors. The fact of Interstate having both union and non-union supervisors came about historically as some businesses Interstate acquired had union supervisors and other acquired companies did not. As of September 11, 2007, 23 New England

Division Sales Managers were non-union and 24 involved supervisors were in the supervisors unit. These supervisors on a daily basis confirm in the morning that orders placed the night before have been filled. After that, supervisor may run a route if someone is out sick or on vacation. According to Padellaro, it has become more common for a supervisor to run a route because of downsizing and layoffs. Otherwise the supervisor generally make sales calls, helps train route sales persons, makes spot checks of customer locations to ensure proper service, delivers promotional or display items to customers and other duties. At the end of their day, they meet with the route sales persons to prepare the daily orders for the bakery. Then the supervisors send in the orders to the bakery and they are produced and then shipped out to the various branches for delivery. Orders are placed for deliveries four or five days out from the date the order is sent to the bakeries. The route supervisor reviews the route sales persons order to ensure that enough product is ordered, taking into account any promotional activity that might be planned. Both the supervisors and the route salesperson bring their best estimate to the order process to try to make the order reflect accurate demand. ²Interstate's goods are sold inn a process like consignment and it is a process seemingly similar to the Company renting shelf space in stores to sell its goods. If too much is ordered, it will go bad before it is sold and must be returned; and, if too little is ordered, store shelves may go bare and sales will be lost. This situation irritates the stores and if it becomes a continuing problem, the amount of shelf space allocated to Interstate may be reduced which obviously can affect the amount of product it can sell. Similarly, if Interstate regularly fails to supply enough product, the stores are less likely to help them promote their products with special displays, advertised sales and other promotional activity.

Padellaro testified that in the case a route salesperson had a vehicle accident while on his or her route, the action taken would be different depending on the severity of the accident. If personal injury was involved, they would call 911. If there was no personal injury and only minor vehicle damage, they would call Interstate's fleet office. If the damage was very insignificant, they would just fill out an accident report when they finished their route for the day. Padellaro said the role of the route supervisor in the case of an accident would be to give the accident report form to the route salesperson, in the event the branch's sales manager was not on site. This activity was described differently by other witnesses who testified the route supervisor would not only help fill out the accident report, but give an independent assessment of the cause of the accident. The other testimony also indicated that the route supervisor might be involved in an investigation depending upon the circumstances of the accident. I credit this latter description of the route supervisor's involvement in accidents.

A route supervisor generally supervises 10 or 11 route sales persons. They receive pay weekly with three components, a base salary, plus \$5.50 per route supervised and a 10 per cent commission on route sales volume.

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These union Division Sales Managers or union route supervisors do not have the authority to hire, fire, discipline, or evaluate other employees. They play no role in setting employees' pay, adjusting grievances, laying off or recalling employees, promoting or demoting

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² Padellaro's testimony would indicate that it is the routes salesperson's ultimate responsibility for his or her order and that the ordering recommendations of the route supervisor do not have to be followed. There is also testimony from other witnesses that would indicate that the route supervisor can overrule the route salesperson in this regard. I do not think either proposition is established by the evidence and there were no examples given of any supervisor overruling a route salesperson with respect to the daily order. The best evidence is that it is a collaborative process.

employees. Routes are assigned and vacations scheduled by seniority in a process set out in the collective bargaining agreements. Padellaro views the involved supervisors to be like working foremen. Pre-September 12, all non-union Division Sales Managers had the authority to impose discipline on the employees he or she supervised. They did not get the authority to hire and fire until they became District Sales Managers, post September 12. ³

The two units' collective bargaining agreements are somewhat interrelated. The supervisors retain seniority on the sales unit's seniority list and have the option of going back into sales and bidding on routes based on their seniority. The sales unit agreement is the primary agreement and certain portions of the supervisors agreement refer back to the sales agreement.

Michael Kurto has been employed by the Company or its predecessor for 23 years. His first six years were spent as a route salesman, and the next four as a union supervisor. Both of these positions were represented by the Union. He then spent one year as a Branch Manger, a non-union position. He then went back to being a union supervisor. The union supervisors position was renamed as Division Sales Manager position about four years ago. Kurto was supervised by Mike Steele, who is called a District Sales Manager and is in the position Kurto earlier called the Branch Manager's position. Steele is obviously a statutory supervisor. Kurto was the union supervisor for the Respondent's bread routes out of the branch and Freddie Royer was his counterpart for the cake routes. Kurto gave more details about the duties of the route salesperson and the former Union supervisor position or Division Sales Manager position.

In his position, he begins in the morning loading his route truck. Then he runs the route, delivering and placing product on store shelves, removing dated product and then returns to the branch. All of his day's activity is recorded on a hand held computer. The computer prints all sales and returns for each stop, and the printout is called the settlement. The settlement is given at the end of the day to his supervisor along with his order for future deliveries. Orders are generally given six days in advance of delivery. His supervisor interacts with him on ordering, advising him of any future sales events or displays which will be in stores on Kurto's route. His route is set and changes only if a new customer is added. Displays are usually set up by the route salespersons. Kurto is paid 10% of net sales for the week plus \$240 base pay. He made a higher wage as a union supervisor. He also got 20 days of paid sick leave as a supervisor and gets none as a route salesperson. All the other benefits are the same for both route salespersons and union supervisors.

As a Union supervisor, his day started at about 7:30am doing paperwork. When that was finished, he would visit stores and check on how his route salespersons were doing and try to get permission to put up displays. He would return to the branch in the late morning to meet with route salespersons as they returned from their routes. As noted earlier, they work together on six-day-out orders and he notifies them is there are any sales in the offing or if he has gotten permission to put up a display. The route salesperson actually delivers the display routinely, but the supervisor also delivers and places them as well. Getting to place displays is important as it helps sell more product. He also enters the route salespersons settlements in a computer so that management can track the daily sales numbers. On occasion, he actually delivered

³ As will be discussed in detail below, on or about September 12, 2007, Interstate unilaterally eliminated the position of Division Sales Manager, and the old position of District Sales Manager. It replaced the old Division Sales Manager position, which had both union and non union persons in it, with a new District Sales Manager position which was intended to be totally non-union.

product that would not fit on the route salesperson's truck. This would usually result if a school ordered bread in quantities too large to fit into the salespersons truck along with his or her other orders. This happened about two times a week and took about four hours each time. He would run routes in the event there were illnesses or too many vacations for the other route salespersons to handle.

According to Kurto, the union supervisor has no input in the salesperson's pay, vacation or route assignments as this is taken care of in the contract. He occasionally rode on a route with a salesperson for a variety of reasons, such as helping a light duty salesperson or for training. It did not happen with any frequency. He had none of the disciplinary authority, hiring or firing authority, that factors into a decision whether a person is or is not a statutory supervisor.

On cross examination, Kurto testified that he sometimes sat in on interviews with job applicants and assigned work to his route salespersons such as assigning a new account to them or directing them to place displays in stores. When Kurto was a union supervisor, if one of his route salespersons had an accident, he would sit with the salesperson and fill out a lengthy accident report, sign off on it, and turn it over to Steele. He also coached his route salespersons on various aspects of their jobs, had the power to override their orders, and reviewed their daily settlements.

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In addition to Padellaro's and Kurto's descriptions of the old Division Sales Manager's position, Interstate offered testimony from management on this subject. Market Unit General Manager Kevin O'Farrell elaborated on the duties of the union supervisor. In addition to other duties already described in above, the union supervisor would visit customers' stores, check on the relationship between the customer and routes salesperson and attempt to strengthen it, check the store space afforded the Company, check what competitors were doing in the stores, and ensure the route salesperson was doing his job properly. If the supervisor found some deficiency in the job performance of the route salesperson, he would attempt to rectify the problem with the offending representative. If the union supervisor could not solve the problem by talking with the representative, he would report it to his supervisor for further action.

If the supervisor discovered on a given day that their order for the day was short, he would make the decision as to how to prioritize the distribution of the available product until more could be obtained.

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Union supervisors had the responsibility to seek out new customers and to seek more business from existing customers. If a new customer were obtained, the union supervisor would then use his knowledge to put the customer on the most suitable route.

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Union supervisors had the responsibility of achieving the Company's sales goals. They also had responsibility for training route salespersons. With respect to probationary employees, the union supervisor had the responsibility of orally recommending whether they stay or go if the supervisor had been given the probationary employee his or her training. According to O'Farrell, these recommendations are usually followed. This function is performed infrequently, perhaps once or twice a year at most.

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With regard to safety, the union supervisor held monthly safety meetings and was the initial person involved in the accident process, filling out an initial report and doing initial investigation of the circumstances surrounding an accident. The Union supervisor would also make his findings as to the cause of the accident. The material utilized in the safety meeting is supplied to the union supervisor by higher management.

O'Farrell testified that the majority of the union supervisor's day is spent calling on customers or interfacing with customers with respect to any complaints or issues they may have.

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Post September 12, 2007, some new District Managers have issued discipline to employees under them. For example, District Sales Manager, Matt Wiedemann, issued a written reprimand to employee John Britto, following a meeting attended by Wiedemann, Britto, O'Farrell and another District Sales Manager, Jim Bliga. As of the time of the meeting, Wiedemann had dropped out of the Union and was in a non-union District Sales Manager position. Weidemann was also shown to have given an oral warning to an employee, post September 12, 2007.

Terry Johnson is a current District Sales Manager for Respondent stationed in Brattleboro, Vermont. He was a non-union Division Sales Manager before September 12 and became a non-union District Sales Manager after that date. He had also been a route salesman for the Company for many years and had been a Union District Sales Manager for two years from 1993 to 1995. He then became a Branch Manager, a non-union position, and then a non-Union District Sales Manager. Johnson confirmed earlier testimony about the duties of Union supervisors and added that their recommendations were sought on probationary employees and uniformly followed by higher management. No examples of this were given in the record. He gave union supervisors under his supervision guidelines on coaching better performance out of the employees they supervised, as the union supervisors could not issue discipline. The record reflects that the guidelines were used by the union supervisors under his direction. These guidelines included writing a written coaching report. In June 2006, the Company adopted the quidelines for use throughout the New England area by union supervisors. Johnson testified that in most cases, the coaching corrected any problems that needed to be addressed. In the few cases it did not work, he investigated independently and took whatever disciplinary action he felt necessary.

Johnson created forms to use by his supervisors designed to ensure that they and the employees they supervised performed all the duties assigned to them in a timely manner. He was also shown to have issued written warnings to his union supervisors for failing to perform their supervisory duties properly.

2. Interstate's Decision to Restructure Its Business and Implement a Path to Market Plan.

It was stipulated that Interstate has been a debtor in bankruptcy under Chapter 11 of the Bankruptcy Act since September 22, 2004.

Jane Miller has been Acting Executive Vice President and Acting Chief Customer Officer since February 2007, when she was called in to help turn around the Company by its new CEO Craig Jung. Both Miller and Jung had previously worked for Frito Lay. Miller was hired because of her experience with direct store delivery, with route design, and her experience in the baking industry. She had worked for several years as Executive Vice President for Best Foods, a competitor of Interstate. She was given the task of studying the Company for about 12 weeks, then devising a plan to get the Company out of bankruptcy. She had successfully performed a similar task for Frito Lay years before.

To devise her plan, she went on route rides with route sales persons and met in meetings with route sales persons and division sales managers. She studied the Company's markets in Memphis, Chicago and Kansas City. She found, inter alia, that the Company's route

sales structure had not evolved as had some of its competitors. It did not have a system which served larger customers differently than it did small customers. In her opinion, the current structure was not meeting the needs of the Company's customers. She also found that the company was top heavy with management and its focus was on top management and not on the front line salespeople and customers.

Since her initial assessment of the business, she has focused on dealings with customers to assess their needs and keep them apprised of the developments in the bankruptcy case. She noted that in the last several years, two major changes have occurred in the retail food sales business. First, Sunday has gone from being a day off to the biggest sales day of the week. Second, the retail grocery business has consolidated to a great degree with fewer, but much larger chains, dominating the business. These larger customers now demand much more from their suppliers than in the past. An adjunct to the consolidation is the blurring of the lines between traditional types of stores. In a change from the past, supermarkets, drug stores and convenience stores and large discount chains like Target and Wal-Mart all compete in the sale of groceries, including baked goods. Being a national supplier has advantages, but Miller testified that IBC was put together by acquisition of regional bakers and has retained its regional approach to business. According to Miller, in large part, the various regional operations were operated differently from one another with no overall national plan or procedure.

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After her study she put together a plan to correct the problems she found and to provide a viable way to emerge from bankruptcy. Her findings included several structural and support problems which she described as follows:

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- 1. No evolution beyond basic conventional route structure;
- 2. Routing done manually with maps, pins and yarn;
- 3. Handheld computer two generations behind in capability;
- 4. Structure/HHC won't support Advanced Supplier Notification;
- 5. Total compensation high relative to advanced DSD comparables;
- 6. Route costs (structure & compensation) consume the P & L.

Miller also found several problems with sales and general management structures which she described as follows:

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- 1. Too many management layers between RSRs (route sales representatives) and CEO:
- 2. Spans of control are low relative to other DSD firms;
- 3. Profit Center Vice Presidents; a) do not directly manage Areas or Key Accounts, and b) have direct responsibility for manufacturing / field ops.
- 4. Unclear definition between HQ and the field;
- 5. National Accounts understaffed versus need and competition Staffing / innovation track record preclude category advisor status.

Her findings of operational problems were as follows:

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- 1. Product quality poor / inconsistent within and across PCs;
- 2. Route returns (stales) unacceptable and consuming profit;
- 3. Product cuts endemic
- 4. No loading protocol;
- 5. Inconsistent KPIs between PC / no standard scorecard;
 - 6. Essential sales reports missing or poorly organized;
 - 7. Sales information hard to access for performance analysis.

Her recommended solutions to these perceived problems were:

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1. Develop / implement a rational route development strategy: a) pre-sell routes for large format customers; b) conventional routes for small format customers; c) National call center / tel-sell routes for smallest customers; d) vend / food service volume to drop ship delivery.

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2. Invest in a new handheld computer platform (\$30 MM+): a) improved ordering, invoicing, and selling capability; b) will require replacement of obsolete HP field boxes; c) will enable Advanced Supplier Notification (ASN); d) will enable creation of 1 national consolidated service center.

3. Bring route compensation to market competitive rates: commission and benefits to rates competitive versus DSD comparables.

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Miller wanted to change the management structure from the current one to an alternative structure as shown below:

Current Structure

Alternative Structure

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- 7. President & CEO
- 6. EVP Business Unit
- 5. VP Profit Center
- 4. Director of Sales
- 3. Area Sales Mgr
- 2. District Sales Mgr
- 1. Division Sales Mgr.

- 5. President Route Sales
- 4. Business Unit General Mgr
- 3. Market Unit General Mgr
- 2. Zone Sales Mgr
- 1. District Sales Mgr

She devised detailed schematics to show the responsibility areas of the new management positions. 30

Miller's suggestions for her problems with quality were as follows:

- 1. Near term, implement top-down product quality focus;
- 2. Conduct SKU (line item) rationalization reviews each PC;
- 3. Develop route returns reduction program and drive compliance;
- 4. Develop and implement service to sales metrics and capability;
- 5. Develop standard Sales KPIs and standard Sales Scorecards;
- 6. Upgrade essential sales reports to include returns and new KPIs.

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Miller summarized her findings and solutions in two summaries. The first was called Three Key Takeaways and included:

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- 1. Route structure and market competitive compensation must be addressed to realize profitability, positive cash flow, and ROC;
- 2. Organization structure must be de-layered and re-focused: from generalist to specialist; from activity to accountability;
- 3. Poor execution must be built or re-built to deliver results.

She expanded on this summary with a more detailed one, as follows: 50

1. Business System 2010 (Path to Market): a)segmented routes; market competitive

route compensation; routing software; and new handheld computers;

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- 2. Organize for Success: a) matrix org structure; take out excess layers; b) new job descriptions and accountabilities; c) upgrade national accounts; build HQ sales capability;
- 3. Back to Basics: NOW!; a)rebuild quality focus; b) drive down returns: c) service –to-sales focus; d) standard sales KPl's and scorecards; e) upgrade essential sales reports.

The Path to Market plan she devised called for more customer contact by first line salespeople, reduced layers of management, and improved product quality. She also wanted to change the existing internal focus of satisfying the wishes of upper management to an external one that focuses on the customer's needs. One way she proposed to do this is use route salespersons in three roles. One group of them would continue to service small customers in the same way as before. Another group would just load and deliver product to the larger customers, dropping the load in their storage area. A third group would work in the stores, placing and removing product on the shelves and performing sales and customer service. She testified that the route salespersons' time was too involved with actually loading trucks, delivering product and managing the store shelves to effectively sell. She envisioned the new District Sales Managers position to be in many ways like the previous Division Sales Managers position, but with the ability to discipline, hire and fire, tools she believed would enable the supervisors to more effectively manage the route salespersons. Under Miller's proposal, the new position would manage approximately twelve routes.

Miller testified that the new District Sales Managers would supervise all route salespersons, the ones who run routes as before, the ones who just drop loads at larger customers and then ones who actually work entirely in the stores. Under her plan, the old District Sales Manager position would be eliminated and new ones would report to a Market Unit General Manager. One of the purposes of the restructuring was to drive responsibility and accountability further down in the organization. The only new managerial tool given the new position was the power to hire, fire and discipline. Miller testified that her proposed new pay structure also gives more incentive to the supervisor to grow business. That pay structure was already in place for the pre-September 2007 District Sales Managers. It was not offered to the old Division Sales Managers unless they accepted the new position.

Prior to September 12, 2007, Respondent's written job description for the Division Sales Manager's principal roles and responsibilities was as follows:

Provide daily management, scheduling, and supervision for assigned route sales persons and route builders. Promote sales of IBC products by implementing company sales direction through sales reps. Call customers to generate sales and strong customer relationships. Ensure fair employment practices are followed with current and prospective employees. Responsible for execution of IBC developed sales strategies. Administer daily safety program among employees. Ensure that contractual obligations are fulfilled, and maintains routine contact with union reps. Ensure that employees are properly and timely submitted for pay and benefits. Run routes during absence of regular sales representatives as needed. Staff and train open positions in route sales for pull up employees. Demonstrate leadership, team building, and conflict resolution for immediate employee group. Ensure that training programs are implemented to assure development and proficiency of employees.

Post September 12, 2007, Respondent's written job description for the successor position's principal roles and responsibilities is as follows:

Provide daily management, scheduling, and supervision for assigned route sales persons, relief route sales persons, merchandisers, and pull up employees. Promote sales of IBC products by implementing company sales direction through sales reps. Call on customers to establish customer relationships, generate sales, and to maintain strong customer relationships. Ensure implementation of Company sales and marketing strategies. Maintain communication with Business Unit GMs, Market Unit GM, and direct reports. Communicate with Operations to ensure product quality and proper order flow. Responsible for Key Performance Indicators for net revenue management, returns and safety. Monitor contractual implementation and maintain union contacts as necessary. Demonstrate leadership, team building and conflict resolution for immediate employee group. Responsible for route level sales plans. Enhance route performance through use of technology.

Under Miller's reorganization plan, there are persons at every level of the business calling on decision makers at every level of their customers' organizations. From the bottom, this would be the route salesperson or the District Sales Manager calling in individual stores in their area and at the top, it would be Miller calling on the head of Wal-Mart, and in between layers of management with responsibility to call on comparable levels of management at the Company's customers.

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Aside from the organizational changes, the Miller plan proposes the expenditure of about \$30 million for new handheld computers and an additional major expenditure to purchase box trucks to replace the aging step vans that make up most of IBC's fleet.

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Miller envisioned the structural changes to begin to occur in September 2007. To achieve this, upper management prepared guidelines to be followed. Miller not only gave her presentation to the Company's Board of Directors, but also made presentations to the Company's unions. IBC has approximately 420 union contracts, covering approximately 20,000 employees. The two primary Unions the Company has contracts with are the Teamsters Union and the Bakers Union. She presented the Company's proposal to the Teamsters national leaders in June 2007. Among the leaders present was the Dennis Raymond, who heads the Union involved in this case. Later that month, Miller was to present the plan to the Company's key constituents in the Bankruptcy proceeding. These were the company's secured creditors, the unsecured creditors and the company's stockholders. The Union is a part of the unsecured creditors group. They needed to be in agreement that the plan was a viable means of coming out of bankruptcy and then succeeding to remain profitable.

In the Company's presentation to the Teamsters in June, various management figures spoke about the various aspects of the company's plan to emerge from bankruptcy. The company stated that if the changes were not made the company would fail. Then Miller's plan was explained. The speakers stressed the importance of the Path to Market approach as vital to the future of the Company. With respect to the changes in structure that would most affect the Teamsters, the presentation stressed that the front line supervisors were going to be given the tools to effectively manage and stressed the importance of the new role of route salespersons. It also pointed out that layers of management were also to be changed or dropped altogether. The new tools the employees would have were noted, i.e., new hand held computers, depot computer access, streamlined exception reporting, company cell phones, enhanced training, and the increase in the number of relief sales representatives. It was noted in the fashion set out above in the comparison of the management structure that the position of Division Sales

Manager would no longer exist. However, there was no discussion of how this would affect the Union Division Sales Managers. Following this presentation, talks about the Path to Market plan took place with all the Company's unions.

As pertinent, the Teamsters did not buy into the Path to Market scheme and opposed its implementation. Ultimately, talks with this union about Path to Market plan broke down and ended. During the talks, the matter of changing the Union Division Sales Manager positions to a non-Union District Sales Manager position did not come up as, nationwide, almost all of the Division Sales Managers were already non-union. Only in the Northeast and in Southern California were any of these positions filled by union members. Pre-September 12, there were approximately 742 Division Sales Managers, of whom approximately 120 were represented by a union and covered by a collective bargaining agreement. The union represented Division Sales Managers in Southern California, by their union, filed charges with the Board as did the ones in New England. The Southern California case was deferred to arbitration under the parties' collective bargaining agreement and is in the arbitration process. The union supervisors involved in this proceeding are included in a class action grievance pursuant to the parties' grievance procedure and will go to arbitration, if arbitration has not already occurred. There was no bargaining between the Union and Company over the matter of the elimination of the Division Sales Manager position and the creation of a new District Manager position. I also find that other than the graph comparison of management positions pre and post-implementation of the Path to Market plan, there was no mention or notice of the intention to eliminate the union Division Sales Manager position.

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Beginning in August 2007, top management began sending notices to employees about changes in management and the roles named individuals would fill. Only one, dated September 11, deals in part with the position of District Sales Manager and states:

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"Reshaping the organization and streamlining our sales management structure is a key element of our new business plan. On August 27, we eliminated the top sales management layer in our organization, the regional Executive Vice President positions. Effective September 12, we are removing a second layer of sales management. This will result in the elimination of approximately 5 percent of our salaried workforce.

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Decisions like this are extremely difficult because of their impact on employees and their families. At the same time, our primary consideration must be the company's long-term survival and financial health.

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Going forward, District Sales Managers (DSMs) will manage teams of Route Sales Reps and will be accountable for net revenue management, product returns, safety, customer service, and marketplace execution in their districts. Each DSM will, on average, manage 11 sales routes and report to a Market Unit General Manager or, in a few instances, to a Zone Sales Manager. At the same time, we are increasing the number of Route Relief Reps and Key Account Managers calling on local customers."

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Prior to this notice getting into the hands of unionized employees and the other events of September 11, discussed later in this decision, no prior notice of the intention to eliminate the union supervision position was given to the Union and no opportunity afforded to bargain over that decision or the effects of that decision.⁴ The decision to implement the elimination of these

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⁴ At several points Miller testified that the matter of eliminating this position was not brought up with the Teamsters, but at page 468 of the transcript, she testified that she presented this plan to the Teamsters on June 14, 2007. She clarified this to mean that she did tell the Union that the Division Manager jobs were being eliminated and replaced with District Sales Managers positions. She did not address the matter of the union Division Sales Managers. On further Continued

jobs was made in June 2007, but the fact that implementation had been decided upon and a date selected was not given to the Union prior to implementation. The approval of the constituents committee was not obtained until after the plan had been partially implemented in September 2007.

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Everything in Miller's plan, including the purchase of cell phones and handheld computers, the additional training of route sales persons and new District Sales Managers, the elimination of Division Sales Managers and their replacement with new District Sales Managers, was supposed to go into effect in the fall of 2007. However the failed talks with the Union stalled the process and the Company's tentative financing to pay for the changes fell through and the Company did not come out of bankruptcy. About the only thing that was accomplished was the organizational restructuring. However, though that was accomplished, none of the tools needed to carry out the rest of the Path to Market were obtained and thus that program is still just a goal. There is hope that it will be back on track by 2010, though that is still speculative given the current state of the economy. Miller testified that the changes she proposes are about a culture change in the company and is not about cost savings per se. On the other hand, the only result of the changes so far is the elimination of layers of management which did achieve cost savings. These savings were estimated by management to amount to about \$14.6 million.

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As will be noted in more detail later, not all Union Division Sales Managers jobs were eliminated in the New England area. Miller believes that some Union supervisor's jobs were maintained in order not to trigger a withdrawal liability under the Multiple Employer Pension Plan Act (MEPPA). She testified that she believed if all the Union supervisor jobs were eliminated such a liability would occur. Miller only learned that five such positions were kept when she began trial preparation of this case.

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Since September 12, IBC has hired about 40 relief route drivers nationwide to cut down on the number of routes that District Sales Managers run when regular drivers are ill or on vacation. It is the Company's intent to keep running routes by Managers to a minimum. Some of these new relief route drivers are former union supervisors who bumped down to the route salesperson position.

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3. Respondent Implements the Restructuring Component of the Path to Market Plan.

On September 10, 2007, Padellaro received calls from a number of route supervisors who said they had been told by management to report to various locations for a meeting the following day with management. They had not been told the subject matter of the meetings. Padellaro then called Joe Cabral, Interstate's Human Resource Manager for New England, Jeff Parlato, who is in Labor Relations for Interstate in its headquarters, Joe Landry, General Sales Manager and Jim Kaczorowski, Cabral's Supervisor. Cabral verified that there were meetings being scheduled but would not reveal what the subject matter of the meetings. He told Padellaro that he could not authorize Padellaro to attend one of the meetings.

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In Padellaro's conversation with Landry, he learned that Landry was meeting with two route supervisors in Malden, Massachusetts. Padellaro asked what the meeting was about and

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examination, she testified that the elimination of the Division Sales Manager position was implied in a chart that showed proposed new managerial positions as compared with the pre-September 12 positions. In her view, the fact that the Division Sales Manager job does not show up on the post September 12 chart would imply that the position was being eliminated. In any event, there was no discussion of the matter with the Union prior to implementation.

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Landry declined to tell him. Padellaro then said he was coming to the Malden meeting as the representative of the supervisors. Landry replied that he could not authorize that.

In his several conversations with Kaczorowski on September 10, Padellaro noted that if Interstate were changing working conditions, it must first bargain with the Union. As was the case with the other calls, Padellaro was not told what the meetings were about.

On September 11, Padellaro went to the supervisors meeting in Malden, Ma. Padellaro first met with the supervisors who were called to the meeting, two from Local 633 and two or three from Local 170. When this group of men got to the meeting with Landry, Padellaro said he wanted to attend the meeting representing the group. Landry said he could not authorize that. Padellaro responded that if he could not attend with the supervisors he represented, there would be no meeting. Landry changed his mind and allowed Padellaro to attend the meeting between Landry and supervisor Murdock McCaskill. Landry told them that the route supervisor's union position was being eliminated and that a new non-union position was being created that would be called District Sales Manager. The new position would have many of the same duties as the existing one, but McCaskill and any other supervisor who wanted to continue to be supervisors had to take the non-union position, go back into sales, or quit. Interstate gave the supervisors 24 hours to make up their minds. Landry could not guarantee that all supervisors who applied for the new position would get it. Padellaro told Landry they had to bargain over this proposed change and Landry responded that he was just following directions.

Padellaro then asked about the supervisors wage guarantee that is in the collective bargaining agreement and Landry said he did not know what was going to happen in that regard and would get back to him with an answer. The wage guarantee in the contract requires the employer, when it makes a change to the status of the supervisor's position, to calculate the supervisor's earnings over a stated period of time and then guarantee the supervisor's earnings would not dip below that for the next 26 weeks. Landry did tell him that the salary for the new position would be calculated taking the average of the wages earned by the supervisor for the first six months of the year, and then making that average the salary for the rest of the year.

At the meeting, McCaskill asked about the benefits attached to the new position.

Padellaro testified that at this point the Union planned on filing a grievance over the proposed change in position. Padellaro also told Landry that Interstate might be facing a financial liability by pulling out of the Union's various funds. Landry indicated that all these considerations were being made by those above him in the Company.

After the meeting, Padellaro spoke with Parlato again and requested bargaining over the proposed change in position. He also complained about Interstate's attempt to keep him out of the meetings. Parlato said he would look into Padellaro's concerns.

Padellaro next had a conversation with route supervisor George Englert on September 11. Englert told him that he had signed a paper accepting the new non-union position and had changed his mind. Padellaro asked for a copy of what he had signed and Englert said the company had not provided him with a copy. Englert wanted to file a grievance.

Following this conversation, Padellaro spoke with Joe Cabral and asked for a copy of whatever Englert had signed. Cabral replied that it was a non-union matter and refused to supply the copy.

Padellaro then sent the following letter to Cabral dated September 12, 2007:

"As you are aware, the New England Teamsters Bakery Drivers Council, acting in conjunction with and on behalf of its affiliated Local Unions, represents the IBC employees who are covered by the collective bargaining agreement commonly known as the 'New England Supervisor's Agreement.'

As you are also aware, on September 10, the employees covered by the Agreement were told that they were required to attend one-on-one meetings with management on September 11. At the September 11 meetings, the employers were advised, in substance, that their Union positions were being eliminated, effective September 13; that they could choose to move to non-Union positions to be titled 'District Sales Manager' or bump into positions covered by the Union Sales Agreement; that the District Sales Managers would be assuming the duties and responsibilities of the employees covered by the Agreement; and that the covered employees were required to announce their decisions by today or be considered to have 'voluntarily' left the employ of IBC, even thought the Company could not (or at least would not) provide the employees with any details concerning the terms and conditions of employment that would be associated with the District Sales Manager positions.

It is the position of the Council that the actions of IBC over the last several days clearly are in violation of the National Labor Relations Act and quite possibly also in violation of the Bankruptcy Act; and the Council intends to immediately act on its belief in the appropriate forums(s). This being stated, the purpose of this letter is three fold.

First, the Council, on its own behalf and on behalf of its affiliated Local Unions and the employees covered by the Agreement, hereby demand that the Company rescind all actions associated with the unlawful transfer of bargaining unit work.

Second, the Council, on its own behalf and on behalf of its affiliated Local Unions and the employees covered by the Agreement, hereby places the Company on notice that any decisions made by the employees covered by the Agreement will have been made by them under duress and without adequate information.

Third, the Council, on its own behalf and on behalf of its affiliated Local Unions and the employees covered by the Agreement, wishes to express its outrage over the manner in which the Company has treated its long-term employees. Legalities aside, the actions of IBC over the last several days speak volumes about the obvious lack of basic decency and humanity on the part of certain of the decision makers at IBC."

This letter was responded to by IBC with Jeff Parlato writing on September 24, 2007:

"I have advised Joe Cabral that I would respond to your letter dated September 12, 2007 regarding the New England Supervisors Agreement.

The Company disagrees with the Council that its actions were in violation of the National Labor Relations Act and/or the Bankruptcy Act. The Company also denies the allegations in the September 12 letter. In response to your three points:

- 1. The Company will not rescind its actions.
- 2. There is not any objective evidence to support the allegations that the employees' decisions were made under duress and without adequate information.
- 3. The Company has treated the employees with decency and respect.

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While these decisions are not easy, the Company is committed to improving its business so that it can survive and provide jobs for its employees. That is why I am hopeful we can work together and focus on saving all 26,000 jobs. Your leadership is crucial if we are going to make it."

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Within a day or two of receiving this letter, Padellaro spoke by phone with Parlato. Padellaro again pointed out his belief that the change was a mandatory subject of bargaining and the Company was obligated to bargain before implementing the change. Padellaro then asked when the Company was going to implement the change. Parlato told him that the change had been implemented on September 12, 2007. Padellaro then orally asked what the changes were, who was and who was not affected and where did the bargaining unit members end up. Parlato responded with an email of September 27 that stated:

"From what I can gather, I believe the following to be true:

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Pre-restructure:

24 supervisors under the CBA

Post restructure:

5 supervisors under the CBA

1 retired

8 went into the sales CBA

10 went to non-union DSM (District Sales Manager) positions"

Padellaro responded with an email dated September 28 that read:

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"As you know we do not saree with the move that the Company has made in t

"As you know, we do not agree with the move that the Company has made in this regard. I appreciate the information and we will address this accordingly."

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Earlier, on September 18, 2007, the Union filed grievances over the change on behalf of route supervisors George Englert, Michael Kurto, Murdock McCaskill and Frederick Royer. These grievances were filed as a class action and were slated to be arbitrated on May 29, 2008. According to Padellaro, the Company has not rescinded its actions, has not offered to bargain over the decision or the effects of the decision to restructure the route supervisors position. As noted in the email above, five route supervisors remain in the Union positions. No explanation was given to the Union for these employees keeping their prior positions. With respect to the ten who accepted the non-Union positions, Interstate is paying them on a basis other than the one in the supervisors agreement and no contributions are being made on their behalf to the Union's benefit funds. Padellaro believes the eight former route supervisors who opted to bid back into sales routes are performing their old route supervisor duties notwithstanding their purported move back into sales.

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Each of the union supervisors who chose not to go into the new non-union position had the right under the contract to go back to a route sales position. Those doing so continued to be paid as called for by the sales contract, with no loss of benefits. Padellaro believed that some of those who moved back into the route sales position were nevertheless still performing the job functions of the union supervisor's position because the Respondent has been unable to fill that function with someone else. He identified two such individuals as George Englert and Bill Hamm. He testified that neither man had been assigned a route though they bumped back into a route sales position.

Padellaro also testified that Article one of the supervisors contract allows the company to

reduce force, though General Counsel asserts that the Article requires the reduction to be with the agreement of the Union.

Michael Kurto also testified about the events of September 2007. On September 11, 2007, Kurto was notified that his union supervisor's position had been eliminated and he became a "route runner or route jumper" filling in on routes for route salespersons either sick or on vacation. On November 10, 2007, he was assigned a route of his own. He still reports directly to Mike Steele. At his branch location, there are 14 route salespersons and three route runners.

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Kurto testified that on September 10, he received a call from someone in Human Resources in Respondent's New England headquarters. That person told him he was required to come to a meeting with Joe Cabral the next day at headquarters in Biddeford Maine. The person calling could not tell him what the meeting was for nor could his supervisor, Mike Steele. The next day he went to the meeting with another union supervisor, Freddie Royer, and met with Cabral and Ron Daoust, Respondent's Area Sales Manager. Cabral began the meeting by saying the Company was eliminating the union supervisor position. Kurto asked if the Union knew about this and Cabral said no. Cabral then said the Company was moving ahead with the Path to Market program. Daoust then offered Kurto a non-union position. According to Kurto, the new job was described as being very similar to his current position, but it would not be a union position and benefits would be supplied by the company rather than the Union. The position would be a salaried one, with pay being the weekly average for the six month period from January 1 to July 1, 2007. There was also some mention of an incentive compensation program, but Kurto did not remember what was said in this regard. If he accepted the position, Kurto would report directly to Daoust and supervise 11 routes out of the Hooksett branch. Under the restructuring, there would be less levels of management. Kurto was given 24 hours to decide whether he wanted the new position or not and was to report back to Daoust by 8 am the next day. Daoust told him that if he did not take the position, he would keep doing what he had been doing for a period of time, then he would be a relief route runner. Daoust told him the branches were getting new computers and ended by encouraging Kurto to take the new position. Daoust also asked him not to discuss the meeting with other union supervisors as some of them would not be offered the new position.

After the meeting ended Kurto called Padellaro and asked if Padellaro knew about the changes taking place. Padellaro indicated that he did not. Padellaro indicated he had heard something was going on, but did not know what. Padellaro called him back later and said he was attending a meeting like the one Kurto had had and would learn more. When Kurto arrived back at his branch, he reported what had happened to Steele. Steele professed to have no advance knowledge of what had transpired.

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The following day, Kurto reported back to Daoust together with Freddie Royer. Kurto declined to take the new position and asked what would happen. Daoust assured him that he would still have a job. He told him that for the time being he would be doing his normal duties, but that on the payroll he would be listed as a route jumper. Daoust indicated that he was thinking of Kurto being a route trainer. This lasted a week or two then Kurto was actually made a route jumper and went to the bottom of the seniority list for route salespersons at the branch. His pay immediately dropped, significantly, according to Kurto. Kurto's former union supervisor duties with respect to the bread routes are now being performed by Steele. Freddie Royer also declined to take the new position and was also made a route jumper. However, according to Kurto, Royer is still performing the old duties of a union supervisor for the cake routes.

Joe Cabral is employed by Respondent as Field Human Resources Manager and has

held that position for two and a half years. He has held several positions with the Company since starting in 1995. He oversees the recruiting of employees, the payroll function for the Company's New England employees, labor relations and some performance management training.

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Interstate has approximately 38 sales and retail locations in New England and the Albany, New York area. Each location has from a low of seven routes to as high as thirty five, depending on the density of population of the branch location. Prior to September 12, 2007, the route sales representatives reported to the Division Sales Managers (Union supervisors). The Division Sales Managers reported to a District Sales Manager. On average the Division Sales Managers were responsible for approximately ten routes.

Cabral learned on September 10, 2007, that the position of Division Sales Manager was to be eliminated. On that date, his supervisor, James Kaczorowski, informed him that as part of inter-departmental changes occurring throughout the Company, the Division Sales Manager position was to be eliminated, and a new, similar position created called District Sales Manager and enhanced by giving that position the authority to hire and fire and to be part of the progressive discipline system. The old District Sales Manager position would also be eliminated. Kaczorowski told Cabral to hold meetings with certain Division Mangers and inform them of the change. All of the New England Division Sales Managers were to be called into meetings with various members of management. Cabral met with three such managers, Mike Kurto, Fred Royer and Michael Caouette, at the Company's Biddeford, Maine facility. Other such meetings conducted by other members of management were held at East Windsor, Connecticut, and Lawrence and Malden, Massachusetts. The East Windsor meeting was conducted by Kevin O'Farrell, a Market Unit General Manager. The Lawrence and Walden meetings were conducted by Joe Landry, another Market Unit General Manager. Some additional meetings were held in Biddeford and were conducted by Market Unit General Manager Ron Daoust, who also assisted Cabral in conducting his meetings.

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General Counsel introduced in evidence a nine page guide to assist management in conducting such meetings. It was prepared at the Company's headquarters. (GC11). No notice was given to the Union about these meetings or the subject matter of the meetings. At the meetings, inter alia, Cabral testified that he told the managers that there were elements of the new position that were the same as the old position. However, the new position would have enhanced responsibilities for working with customers and managing and directing the work force. He reviewed the compensation system for the new position, including the performance incentive plan. He also informed the three managers that they had 24 hours to decide whether or not they would take the new position. He told them that under the collective bargaining agreement, they could bump into a route sales position if they declined the offer.

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General Counsel introduced a spreadsheet of the managers affected by the changes of September 12. Pre-September 12, there were five District Sales Managers and forty seven Division Sales Managers. According to the exhibit, there were twenty four Division Managers represented by the Union and twenty three non-union Division Managers. Post September 12, of the 24 union represented Division Sales Managers, 5 remained under the CBA, 1 retired, 8 went into the sales CBA, and 10 went to non-union DSM (District Sales Manager) positions. One of the union managers who went into the sales CBA went on workmen's compensation shortly after September 12, and another one voluntarily guit in October, 2007.

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The Division Sales Managers who remained in the Union post September 12, had their job titles changed to District Sales Manager, but nothing else changed. Cabral had no knowledge why these five were not forced to either take the new non-union District Sales

Manager position or bump back into the route sales force. In most cases it appears that the decision to offer certain pre-September 12 Division Sales Manager what amounts to a continuation of their existing union represented position was made prior to September 12 as an offer letter in their name was prepared pre-September 12. Cabral, on examination by the Company's counsel stated that he had heard the decision to keep some union Division Sales Managers in Union District Sales Manager positions was somehow related to Company pension liabilities. Cabral was not informed how many union supervisor positions would be retained, post September 12. At a later point in his testimony, he stated that Mike Colgan, area Director of Sales, made the decision on who would be offered the union District Sales Manager position as opposed to the non-union position. Cabral did not know how this decision was made.

General Counsel introduced two emails bearing on this issue. One was from Mike Colgan to Jim Forbes, Vice President, dated September 7, 2007. Its subject was "union non union issue New England." The email reads:

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"Jimmy – attached file is updated listing of potential union/non-union positions in response to MEPPA (Multi Employer Pension Plan Act) issues. Parameters used:

1) All branches to have at least one non-union DSM (District Sales Manager)

2) Branches that staffing requires only one DSM that DSM will have to be non-union.

Under the above scenario we will maintain 13 union DSM positions. The question that remains unanswered is if an employee wants to get out of the union can we honor that request (probably a non event but we could have one or two)?"

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Forbes responded with an email of the same date which reads:

"It is imperative that we keep some of our DSM's in the union. To this extent, every branch will have at least one non-union DSM assigned to a branch. In larger branches, we will have two non-union DSM's assigned to a branch to give us flexibility. The third DSM in the branch can remain in the union. Make sure New England has at least two union DSM's going forward. Non-union DSM's remain non union. Please call each other Wed morning to make sure you all have this straight. Call me if you have a question."

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This latter email was forwarded to Cabral by James Kaczorowski. On September 12, Cabral received an email from Kevin O'Farrell, which forwards an email from Jim Forbes to Mike Kafoure, and which reads:

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"I have talked to Mike Colgan this morning about the union DSM jobs and he says at the very most, we will have eight union DSM's left out of the 25 in New England. Once he has two locked in, he will tell his guys to start discussing the non-union approach. He thinks he may get a few more. The incentive plan that came out last night will be a big help in convincing the guys to make the switch to non-union. He is going to tell the guys that if they opt to stay in the union (after the two are locked in) that they will be the first DSM on a route as that is the primary difference between union and non-union. We can also hold back the incentive from the union DSM's to keep a point of difference. We can discuss that his compensation plan would have to be negotiated. Tell me what you think as the meetings have started in New England. This will only affect the eight potential union DSM's but should the point of difference be:

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- 1. Union DSM's will be the first to run routes.
- 2. Union DSM's are not currently eligible for the incentive.

I would appreciate your feedback ASAP. Thanks much."

Kevin O'Farrell is one of Interstate's Market Unit General Managers. He began working for the Company as a union represented route sales representative and has risen through the ranks working as a supervisor, Branch Manager, Sales Manager and District Sales Manager. O'Farrell's immediate supervisor is Jim Forbes, Interstate's Northeast Business Unit Manager. Forbes was also Colgan's immediate supervisor. Both Forbes and Colgan instructed O'Farrell as to what to do with respect to the changes of September 12. He conducted meetings with Division Sales Managers on September 11 in Worcester, Massachusetts and on September 12 in East Windsor, Connecticut. The meeting in Worcester involved six union represented Division Sales Managers. These managers were Mike Santaniello, Jim Bradley, Mike Curry, Matt Wiedemann, Mike Paquette and Brian Donovan. O'Farrell told the managers that they were going to be given an opportunity to take a non-union position the following day. On the 11th, he believed that all Division Sales Managers would have to go non-union if they wanted the new District Sales Manager position. It was his understanding that if they did not take the new position, they could bump back into a route salespersons position.

In the meetings, he informed the managers that the job would be changing and that he had an offer for them to take or reject the following day, and that offer was for a non-union position. He told them the job title, duties and responsibilities were changing, and that there would be a change in benefits and compensation. On September 11, O'Farrell was not aware of the salary that would be offered, but did discuss the new position's benefits. Similarly, on the 11th, O'Farrell was not aware of the new position's duties and responsibilities.

On September 11, after the meetings were over, he received an email from Colgan that has been noted above. O'Farrell responded sending an attached spreadsheet that reflected his views as to how the individual managers listed would respond to the offer of the new non-union position, that is, whether they would opt to stay union or take the non-union position. O'Farrell in the attachment laid out his best estimate of which branches individuals would be assigned and whether they would likely be union or non-union. As all non-union persons listed on the attachment were required to stay non-union, it only has relevance with respect to the union Division Sales Managers. Regardless of what O'Farrell believed at the time the attachment was made, he did not offer any of the managers he met with on the 11th the opportunity to take the new position and remain union. On September 12, after the series of emails, he offered each person he met with the opportunity to take the new position either as a union position or non-union position. Most of these managers chose to take the union District Sales Manager position.

At the meetings on the 12th O'Farrell told the involved managers that the Company was creating a new position and eliminating two levels of management. The former District Managers position (Mike Steele) and the former Director of Sales positions were being eliminated. This structure was being replaced by a new District Sales Manager position. The persons filling this new position would be the front line supervisor and would report to the Market Unit General Manager, who in turn would report to the Business Unit General Manager. The duties of the former District Sales Manager would be performed by the new District Sales Manager who would also perform many of the duties of the former Division Sales Managers.

One of the managers O'Farrell met with and anticipated giving the new non-union District Sales Manager job was Mike Curry. An acceptance letter was prepared for Curry's signature accepting that position. At the meeting Curry indicated he had invested too much over too many years in the Union's Pension plan to switch. O'Farrell apparently made the decision at that point to offer him the Union District Sales Manager position, which Curry accepted.

O'Farrell testified that in the other cases where the manager accepted a new union position, they altered the letters and then retyped them to conform.

During the course of the hearing, the parties entered into the following stipulation:

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"The duties that have been performed by the union supervisors are now being performed by the post-September 12, 2007 District Managers with the exception of running routes which the District Managers will only do in the most extreme circumstances. The non-union post September District Managers, excluding the five who are still in the bargaining unit, are statutory supervisors under Section 2(11) of the Act by virtue of the fact that they have the authority to hire, fire and discipline employees they supervise."

C. Conclusions

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Interstate has raised a number of defenses to the Complaint allegations, none of which have merit in my view. I will agree with the Company that Path to Market or another plan is necessary for the Company's long-term survival. Yet, what is involved in this proceeding is but the tiniest part of the Path to Market plan. This case only involves 24 employees and what the Complaint seeks is not the derailment of that plan, but simply the return to the status quo before September 12 for those 24 employees, and good faith bargaining over the decision to eliminate the 24 positions and the effects of that decision. Interstate has been shown to have taken MEPPA into consideration and modified its decision to eliminate all Union route supervisors to allow several employees to remain in that position. It is clear from the evidence that Miller, the Path to Market author, was unaware of the need to bargain over the involved decision and its effects when the plan was implemented. That is no excuse for failing to abide by the labor laws.

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Below I have addressed each of Respondent's defenses. I have read the briefs of all parties and have in large part adopted the reasoning of the General Counsel on the legal conclusions the facts dictate. To the extent that General Counsel's reasoning differs from mine or in my opinion, needs clarification, I have noted that.

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1. Do the Parties collective bargaining agreements allow Respondent to unilaterally eliminate the position of Union Division Sales Manager and Create a New non-Union Position?

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The answer to this question is no. Arguably the parties' collective bargaining agreements allow Respondent to reduce the number of such positions, it clearly does not allow Respondent to totally eliminate those positions. There is no express waiver of the Union's statutory right to notice and bargaining. Therefore this argument fails.

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2. Should the Board defer this dispute to arbitration?

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Again the answer to this question is no. The only reason to defer is to save the time and expense of a Board trial, both of which have already been incurred. More importantly, arbitration will not satisfy the directives of the Act by requiring bargaining over the involved decision and the effects of that decision. It will not reach the question of the information requests. The Board usually refuses deferral when there is an unlawful refusal to supply information alleged in the Complaint. Accordingly, I will not defer this proceeding to arbitration.

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3. Are the Involved Employees Supervisors within the meaning of Section 2(11) of the Act?

The short answer is no. The reasons why I make this finding are set out below. Many of the witnesses appearing in this proceeding offered evidence that relates to the supervisory status of the union supervisors. All of this evidence I found relevant is set out above at various points. I am repeating some of it here for the convenience of the reader of this decision.

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Prior to September 12, 2007, there were 24 union route supervisors working in various branches located throughout New England. They were covered by a Union Supervisors collective bargaining agreement. Some branches had more than one route supervisor assigned to it. Route supervisors oversee 8-11 routes run by route sales representatives, who are represented by the Union under a separate Sales collective bargaining agreement. Both agreements were in effect during all times material to this decision.

The routes sales representatives begin work between 2:00 a.m. and 6:00 a.m. and run assigned routes. They load their vehicles and deliver product, either bread or cake, to customers' stores and take out the returns. When their day is done, the route sales representatives return to their branch, unload their vehicles, and usually meet with their route supervisor to turn in their settlement package relating to that day's activity. The route supervisor reviews the settlement paperwork, discusses the day's work and makes sure that there were no product shortages and that all customers were serviced. The route sales representative and the supervisor then review the representative's order for the next business day, which is several days out as product is ordered several days in advance. The route sales representative and route supervisor have a joint discussion regarding the order and various market factors are considered. The route supervisor will discuss any upcoming company product promotions which may affect the order, and also may discuss any other issues that may have arisen in connection with the route. This includes any additional product displays the route supervisor may have obtained for the route sales representative's route. These after route meetings take about five minutes and by all accounts are routine in nature. Following the daily meetings, the route supervisor is responsible for entering the settlement accounts received from the route sales representatives into the computer and sending the information to the Respondent's office in Biddeford, Maine.

Route supervisors begin work between 6-8 a.m. and work until about 5 p.m. Route sales representatives are paid a base salary plus a 10 percent commission on their net sales for the week. Union route supervisors are paid a base salary, plus \$5 per route for each route assigned to them, plus the average commission earned by the route sales representatives assigned to them. Route sales representatives and route supervisors receive the same fringe benefits under their collective bargaining agreements in terms of pensions, health and welfare and vacations. To the best of my knowledge, route supervisors get some sick days, whereas route sales representatives do not.

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Route supervisors open the mail upon arriving to work and go through the paperwork verifying that there were no major cuts in orders. They are involved in payroll only to the extent that they submit a form verifying that the employee was at work on a given day. They have no role in calculating the pay of a route sales representative.

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The route supervisors are responsible for seeking out new customers. When a new customer is obtained, the route supervisor decides what route to assign the new customer to and the frequency of service. There is no record evidence of the criteria used when making these decisions or the frequency with which these decisions are made. The route supervisors are also involved in customer relations matters.

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Route supervisors may bring product displays to stores to be serviced by route sales

representatives. They deliver product overloads which are orders too large to fit into a route sales representative's truck. One route supervisor testified that this duty arose for him about twice a week, taking 3-4 hours each time. These loads involved delivering bread to schools. Route supervisors also run routes when a route sales representative is out sick or on vacation. This duty arises more frequently during the summer vacation months. The route supervisor is expected to perform his regular duties when filing in as a routes sales representative.

Route supervisors will go out to stores to perform market checks to ensure that customers are satisfied and to attempt to sell more product, secure more shelf space and secure approval for store displays. Kurto testified that the only work assignments he made to route sales representatives were to assign new stops for them to begin servicing, inform them of specials being run, and inform them of displays that were to be set up on their routes. Route supervisors do not assign routes to specific route sales representatives. Routes are bid by seniority under the sales collective bargaining agreement.

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Respondent's wage component of a sales commission for both route sales representatives and route supervisors is an incentive for both to try to increase revenues by finding new customers, getting approval for displays or securing additional shelf space.

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Route supervisors do not have the authority to hire or fire. Indeed the unit description would exclude them if they did. Route supervisors do not have the authority to layoff or recall employees, promote employees, or perform employee evaluations. They play no role in employee pay raises or promotions. They have no role in the adjustment of employee grievances.

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Route supervisors have no authority to discipline employees. Respondent witnesses Kevin O'Farrell and Terry Johnson each confirmed that union route supervisors do not have the authority to discipline employees. Rather, union route supervisors are involved in "coaching" employees. O'Farrell testified that route supervisors try to resolve problems with route sales representatives by conversation. If the route supervisor is unable to resolve the issue, the matter is referred to O'Farrell to take formal disciplinary action. There is no record evidence that the route supervisors play any role in O'Farrell's imposition of discipline on any employee.

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Terry Johnson developed a coaching report form by which route supervisors could memorialize their coaching of route sales representatives. The object of the coaching report was not discipline, but for the route supervisor to point out employee short falls in performance and to recommend corrective action. Johnson testified that 90 percent of the time, coaching reports are filed and no further action occurs. However, if there were multiple reports of the same conduct by an employee, Johnson conducts his own investigation to determine if discipline is required. Johnson accepts the route supervisors input on the situation. There is no set number of coaching reports which result in disciplinary action to can employee. Disciplinary action is determined by Johnson following the completion of his own investigation.

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Kurto testified that he had sat in on hiring interviews in the past as a route supervisor, though he had not sat in on one in six years. There is no further evidence regarding the frequency of these occurrences or the nature of Kurto's involvement in the interview or subsequent decision to hire or not to hire.

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Route supervisors are involved in the training of probationary employees, which is overseen by stipulated supervisors such as O'Farrell and Johnson. Both O'Farrell and Johnson testified that route supervisors recommended the retention of probationary employees to them. Johnson said this had occurred about two to three times in the two year period from 2005-2007.

Johnson testified that he followed the recommendation of the route supervisor after conducting his own investigation. O'Farrell testified that he followed the route supervisor's recommendation as to the retention of probationary employees most of the time. O'Farrell sought the recommendation of the route supervisor if they had trained the probationary employee. On average O'Farrell sought the recommendation of a route supervisor in this regard about twice a year. No additional evidence was adduced with respect to the frequency or effectiveness of such recommendations.

The route supervisors are the primary investigators of accidents involving employees. Route supervisors prepare accident reports which determine how the accident happened and how it can be avoided in the future. The route supervisors, when preparing an accident report, make no recommendations as to any action that should be taken against the employee who has had the accident.

Route supervisors assign relief employees to cover routes when the regular sales representative is absent. While Terry Johnson testified that route supervisors make such assignments based on their knowledge of a particular route, he later admitted that such assignments must be made by seniority under the terms of the sales unit collective bargaining agreement, except in emergency situations. In emergency situations, in the absence of an available relief route runner, it appears the route supervisor runs the route him or herself.

Route supervisors hold monthly safety meetings on occasion. Management determines what topics will be discussed at safety meetings and the safety department provides the materials to be discussed at safety meetings. Johnson testified that route supervisors conduct such meetings when he is not available, about 3/4ths of the time.

Respondent produced three records of discipline issued to route supervisors, Kurto received an oral warning on January 27, 2000 for failing to check orders before going home at night, resulting in the under-ordering of product. George Englert was issued a letter by District Sales Manager Terry Johnson criticizing him for "operational shortfalls" including achieving his net sales target, controlling product returns, not having a comprehensive nightly conduct program, incomplete X books, failure to enforce company policy regarding credit, branch and vehicle sanitation issues and lack of communication with his superiors. On June 21, 2007, Englert was issued an oral warning for poor performance by Johnson because he did not uphold the company standards on credit collection, his X book was incomplete and he was not properly scheduling manpower. This incident occurred when Englert scheduled himself to do a call back on a Saturday instead of a Sunday to prevent himself from working a seven day week. Johnson admitted that route assignments of route sales representatives and the assignment of relief employees are controlled by the collective bargaining agreement. There is no evidence of the substantive basis underlying these infractions.

It is well established that, in order to support a finding that an employee is a supervisor under the Act, the employer must demonstrate that the employee possesses at least one of the indicia specified in Section 2(11) of the Act. These indicia are that the individual has the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or to effectively recommend such action. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710 (2001). Further, such statutory indicia must be exercised with independent judgment on behalf of management and not simply in a routine manner. *Airline Commercial Barge Line Co.*, 337 NLRB 1070 (2002). The burden of proving that an individual is a supervisor rests on the party alleging such status. *Arlington Masonary Supply*, 339 NLRB 817, 818 (2003). Because the burden of proof is on the proponent of supervisory

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status, a lack of proof will be construed against that party, here, the Respondent. *Kentucky River, supra*, at 710-712; *Elmhurst Extended Care Facilities*, 329 NLRB 535, fn. 8 (1999).

There is no contention, and no evidence, that the route supervisors hire, transfer, suspend, layoff, recall, promote, discharge or reward employees or effectively recommend such actions. There is some evidence that route supervisors may influence the retention of probationary employees or some evidence that route supervisors have some role in the disciplinary process. Such evidence is not persuasive in my view.

I believe that Respondent has failed to establish that the route supervisors possess the authority to discipline the route sales representatives. O'Farrell and Johnson both testified that the routes supervisors did not have the authority to discipline. Johnson testified that the route supervisors may complete coaching reports regarding the sales representatives' performance, but stated that these coaching reports are not disciplinary in nature. Instead, they are used to encourage improvement in performance. In the event these reports indicate to Johnson that discipline may be needed, he conducts an independent investigation before giving any true discipline. In these circumstances, the authority of route supervisors to issue coaching reports does not establish that they have the authority to discipline employees. Vencor Hospital-Los Angeles, 328 NLRB 1136 (1999)(Verbal warnings reduced to writing and placed in employee personnel file did not constitute discipline where disputed supervisor made no recommendation as to discipline, upper management would not act on the reported incident without conducting its own investigation and there was an absence of evidence as to how the report impacted the employee's job status or tenure. Jochims v. NLRB, 480 F.3d 1161 (D.C. Cir. 2007); reversing Wilshire at Lakewood, 345 NLRB 1050 (2005)(Court reversed Board, finding no supervisory status where employee had authority to document infractions, but write-ups contained no recommendation for discipline, were place in employee file for review by management, and management would decide on its own whether to discipline). Compare Starwood Hotels, 350 NLRB 203 (2007)(employee found to be a supervisor where coaching and counseling was the first step in the disciplinary process and employee made effective recommendations as to discipline); Berthold Nursing Care Center, Inc., 351 NLRB No. 9 (September 26, 2007)(employees found to be supervisors where they completed counseling forms which initiated the progressive disciplinary process and affected the employees' job status; purported supervisors also effectively recommended employee discipline.)

I believe and find that Respondent failed to establish that the route supervisors are statutory supervisors by virtue of an authority to assign work or to responsibly direct the work force. The record evidence does not establish that the route supervisors' limited authority in this regard make them anything more than leadmen; it does not establish that they possess Section 2(11) supervisor authority. In Oakwood Healthcare, 348 NLRB 686 (2006), the Board refined its analysis of the terms "assign," "responsibly direct," and "independent judgment" in assessing supervisory status. The Board announced that it construes the term "assign" to refer to "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. Id, slip op. at 4. With respect to "responsible direction," the Board explained that, if a person has "men under him" and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both "responsible" and carried out with independent judgment. For direction to be "responsible," the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is the prospect of adverse consequences for the putative supervisors if they do not take these steps. Oakwood, supra, slip op. at 5-7.

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the judgment is exercised. "[T]o exercise independent judgment, an individual must at a minimum set, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id., slip op at 8. "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set for in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. The Board also stated that the degree of discretion exercised must rise above the "routine or clerical." Id.

As to assignment of work by the route supervisors, there is no record evidence that they assign work to the route sales representatives. The routes run by the route sales representatives are assigned by bid under the collective bargaining agreement. Similarly, the routes taken by the route runners who substitute for route sales representatives are assigned by seniority under the terms of the collective bargaining agreement. The route supervisors do assign new customers to the routes run by the route sales representatives. Assuming this action is considered an assignment of work, there is no evidence of the criteria used in making the assignment or to what extent, if at all, the use of independent judgment is required by the route supervisor in determining which route sales representative receives the new customer. Accordingly, Respondent has not established facts warranting a finding that the route supervisors assign work to the route sales representatives or, if they do, that they use independent judgment in making the assignments.

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The evidence does not support a finding that the route supervisors are statutory supervisors by virtue of their authority to responsibly direct employees. The record does not establish, first, that the route supervisors responsibly direct the work force. As noted above, the route sale representatives run routes assigned by a bid process under the contract. The route sales representatives work on the road and on their own the vast majority of the work day. They begin their work day before the routes supervisors do and are out on the road before the route supervisors arrive to work. Their nightly contact meetings held with the route supervisor last about five minutes, and according to Michael Kurto, are "pretty basic" in reviewing the days events. Moreover, these night contact meetings do not always occur, such as times when the route supervisor is running a route for an absent route sales representative.

The route supervisors' involvement in the ordering process does not warrant the conclusion that they responsibly direct the route sales representatives. While the route supervisors do review the orders submitted by route sales representatives, the evidence establishes that any changes made are made by consensus between them. Even assuming this review constitutes direction of the work force, there is no evidence on the record of any standards or judgments applied by the route supervisor in his review of the orders he sees. It has not been established that any direction given by the route supervisors in this regard involves the use of independent judgment. The record is silent as to any orders that a route supervisor changed over the objection of the route salesperson during this review. Both the route salesperson and the route supervisor bring their historical knowledge of the particular marketplace, their knowledge of promotions, holidays, seasonal fluctuations and other factors into the order decision making process. This is more of a technical function rather than supervisory one. I find that Respondent has not established that any such directions constitute responsible direction of the workforce. Similarly, the route supervisor's decision on how to allocate product in the event that an order comes in short of product ordered or with an excess of products does not establish supervisory status. Again, this allocation is more of a technical

process rather than a supervisory one.

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Similarly, the route supervisors inform route sales supervisors of upcoming product promotions, or specials, and of new product displays to be placed in stores on their routes. These communications do not constitute direction of the work force but, rather, are merely reporting to employees the decisions made by others. These instructions are of a "routine or clerical" nature. *Oakwood Healthcare*, supra. Thus, they do not establish responsible direction of the workforce by the route supervisors.

It is clear from the record evidence that the route sales representatives are fairly experienced and generally know what to do without any further direction from the routes supervisors. *Croft Metals, Inc.,* 348 NLRB 717 (2006)(lead persons do not exercise independent judgment in directing employee, where the employees generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance, and the employed adduced almost no evidence regarding factors weighed or balanced by the lead person in making production decisions and directing employees). This factor also weighs against a finding of supervisory status.

There is also scant evidence that route supervisors are held accountable for the work of the route sales supervisors. That accountability pre-September 12, 2007 rested at the lowest managerial level with the former District Sales Managers, the level above route supervisors. To demonstrate accountability, the Board requires that the putative supervisors be held accountable for the performance of their subordinates, not just for their own performance. *Oakwood Healthcare*, supra. The sole evidence regarding this factor comes by virtue of three warnings introduced into evidence concerning route supervisors Kurto and Englert. A review of these warnings demonstrates that Respondent has failed to meet this standard.

The warning issued to Kurto makes clear that Kurto was disciplined for his own failure to check orders before going home at night rather than for any misconduct by his route sales representatives. Accordingly, this warning does not establish that Kurto was held accountable for the conduct of others. Similarly, the two warnings given to Englert are for his own failures in performance of his job, not those of the route sales representatives. Englert's failures in his first warning, about which there was no substantive testimony, included failing to achieve his net sales target, failing to communicate with his superiors, issues with branch and vehicle sanitation, issues regarding proper reporting of incidents of accidents and incomplete X-books. None of these infractions, on their face, demonstrates that Englert was being held accountable for the performance of route sales representatives.

In his second warning, Englert was cited for not upholding company standards on credit collections, incomplete X-books, failing to timely communicate with his superior and not properly scheduling manpower. These infractions also do not, on their face, indicate Englert was being held accountable for the performance of route sales representatives. While this latter infraction might indicate an issue with his route sales representatives, a reading of the warning indicates that it does not. Englert was cited for his personal failure in not servicing a Wal-Mart on a Sunday because he did not want to work seven days in a row. Further, Terry Johnson testified that the scheduling of relief work personnel is controlled by the collective bargaining agreement.

By failing to provide any substantive explanation beyond what is written in the warnings, Respondent has failed to demonstrate that the route supervisors were being held accountable for the action of their route sales representatives, rather than for their own misconduct. Each of the matters for which Kurto and Englert were written up appears, on its face, to be attributable to their own failings rather than those of the route sales representatives. Thus Respondent has

failed to meet its burden of demonstrating that route supervisors are statutory supervisors by virtue of their ability to responsibly assign or direct the route sales representatives.

Respondent introduced evidence from management above route supervisors that the supervisors input is sought when deciding whether or not to retain probationary employees. This practice was not shown to be uniform in the New England area. O'Farrell testified that he relies on the route supervisor's recommendation "most of the time;" however, Johnson testified he has conducted his own investigation before relying on the recommendation. Moreover, this advice from route supervisors is only sought once or twice a year. Thus, the evidence does not clearly establish that the route supervisors' recommendations are routinely sought and/or followed. Isolated or sporadic exercise of authority is insufficient to establish supervisory status. *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997), citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Therefore, for these reasons, I find that the route supervisors' sporadic recommendations as to the retention of probationary employees do not establish they are statutory employees.

The fact that the route supervisors conduct monthly safety meetings on occasion does not establish that they are statutory supervisors. The topics for these meetings and the materials to be presented are chosen by management; the route supervisors merely act as presenters of the materials. A leadman's presentation of safety material chosen and prepared by management does not reflect the type of discretion indicative of supervisory status. *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 914 (1988). Further, the fact that the documents utilized at the safety meetings refer to the route supervisors as "supervisor" is not dispositive of their statutory status. *Feralloy West Co.*, 277 NLRB 1083, fn. 6 (1985).

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As noted earlier, the route supervisors are the initial investigators of employee accidents and prepare reports regarding the accident. Whey they may assess fault for the accident, they make no recommendations as to what action, if any, should be taken against the employee who had the accident. The record is devoid of evidence as to what happens, if anything, with the accident reports once completed by the route supervisors. These facts are insufficient to warrant a finding of supervisory status.

In conclusion on this issue, on the unique facts of this case, I find that the union route supervisors were not statutory supervisors and were employees within the meaning of the Act. In Shaw, Inc., 350 NLRB 354 (2007), the Board overruled an ALJ's finding that foremen were statutory supervisors under the Act. In this regard, the Board ruled that the foremen assign and direct employees much like a lead person overseeing routine functions and following established prescribed practices and that the evidence did not establish that they exercise independent judgment. The Board also noted that "most of the Respondent's projects involve tasks which are recurrent and predictable. . . " Likewise, the Board found that, "much of the work performed by the crewmembers is routine and repetitive; there is no showing that such work requires more than minimal guidance" and as, such, there was an absence of direction. See also, Croft Metals, Inc., 348 NLRB 717 (2006)(Lead persons, like the foremen, did not prepare employees' work schedules or assign them significant duties, but rather worked along side them, performing the same types of tasks, and occasionally switched assignments and rotated tasks, but within an established routine, requiring the exercise of no real discretion). Similarly, I find the tasks performed by the Union route supervisors to be routine, repetitive and requiring little, if any, independent judgment.

4. Assuming Route Supervisors are Statutory Supervisors, Did Respondent Still Have a Bargaining Obligation in the Circumstances of this Case?

While an employer cannot be compelled to recognize a union as the representative of a unit containing supervisors, an employer can agree to a contract which covers employees who are statutory supervisors. *NLRB v. New Syndicate Co.*, 365 U.S. 695, 699 fn. 2 (1961). Though I have found that the route supervisors are not statutory supervisors, assuming arquendo, the Board decides otherwise, it is undisputed that Respondent voluntarily entered into a contract with the Union covering route supervisors. The Board has consistently held that where parties to a collective bargaining relationship have voluntarily agreed to include supervisors in a bargaining unit, the Board will order the application of the terms of the collective bargaining agreement to those supervisors. Thus, the Board has held that unilateral changes to the terms and conditions of employment of supervisors in such a situation violated Section 8(a)(5) of the Act. *Gratiot Community Hospital*, 312 NLRB 1075 fn. 2 (1993); *Union Plaza Hotel & Casino*, 296 NLRB 918 fn. 4 (1989), enfd. sub. nom. *E.G. & H, Inc. v. NLRB*, 949 F.2d 276 (9th Cir. 1991), citing *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1961).

In *Gratiot Community Hospital*, the respondent unilaterally terminated the position of nursing supervisor, contending that the duties which were eliminated were supervisory in nature and therefore, it had no obligation to bargain concerning them. The Board found that, even assuming the nursing supervisors were statutory supervisors, the respondent was not privileged to make unilateral changes in their terms and conditions of employment during the term of the collective bargaining agreement where it had voluntarily agreed to include the purported supervisors in the bargaining unit covered by the contract. *Gratiot Community Hospital*, supra, at fn. 2.

Similarly, the Board found that an employer violated Section 8(a)(5) where it unilaterally changed the job descriptions of registered nurses during the term of a collective bargaining agreement, even assuming that the nurses were supervisors. *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1108 (1997). In following the holding of *Gratiot Community Hospital*, the Board held that the employer had voluntarily agreed to include the nurses in the bargaining unit and, therefore, could not make unilateral changes in their working conditions during the term of the contract.

The Union has represented the Respondent's route supervisors in a separate unit since about 1993 through a series of collective bargaining agreements, the current one of which expires in 2010. Through Respondent's predecessor employers, the Union has represented these employees for about 50 years. The route supervisors are admittedly included in the bargaining unit and their duties, which have not changed since before the execution of the current contract, were known to Respondent. Accordingly, even if the involved route supervisors are ultimately found to be statutory supervisors, Respondent voluntarily agreed to enter into a collective bargaining agreement that includes them. Therefore, Respondent was not privileged to make unilateral changes to the bargaining units during the term of the contract without giving notice and an opportunity to bargain to the Union.

5. Did Respondent Violate the Act by Unilaterally Eliminating the Union Route Supervisor's Position without Affording the Union Notice and an Opportunity to Bargain over That Decision and its Effects?

Once a specific job position is included within a collective bargaining unit by either Board action or the consent of the parties, the parties can neither remove or modify that position without the consent of the union or the Board. *Hill-Rom Co.*, 957 F.2d 454, 457 (7th Cir. 1992); *Wackenhut Corp.*, 345 NLRB 850, 855 (2005). It is also clear that neither the decision to create a new supervisory position nor the selection of individuals to fill those positions is a mandatory subject of bargaining. *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 627-628

(1984). "[W]hen an employer promotes an employee to a supervisory position and the new supervisor continues to perform former bargaining unit work, however, the work is removed from the bargaining unit. That is a change in the bargaining unit's terms and conditions of employment, giving rise to the employer's bargaining obligation under Section 8(d) of the Act." Hampton House, 317 NLRB 1005 (1995); Wackenhut Corp., supra; Catalina Pacific Concrete Co., 330 NLRB 144 (1999); Mt. Sinai Hospital, 331 NLRB 895 (2000). The failure to give the Union notice and an opportunity to bargain over the removal of work from the bargaining unit constitutes a failure to bargain over a mandatory subject of bargaining and a violation of Section 8(a)(5) and (1) of the Act. Hampton House, supra. Further, where a unilateral change has a substantial impact on the bargaining unit, a violation of Section 8(a)(5) must be found. Catalina Pacific Concrete Co., supra, at 150 (unilateral removal of three-fourths of the bargaining unit constituted a substantial impact on the bargaining unit and violated Section 8(a)(5).

In *Hampton House*, an employer unilaterally transferred five LPN's out of the bargaining unit and promoted them to supervisory positions. As a result of the transfer, the LPN's had been granted supervisory authority, an increase in pay and no longer enjoyed the benefits under the union contract, but continued to perform their bargaining unit duties. The Board found that, even assuming the new position held by the employees was supervisory, the critical fact was that they continued to perform unit work. The Board found that removal of bargaining unit work from the unit was a mandatory subject of bargaining and the employer violated the Act by removing that work without giving notice and an opportunity to bargain to the union.

In Wackenhut Corp, the employer eliminated the position of CAS/SAS operator from the bargaining unit and reclassified these employees as non-unit lieutenants. The respondent contended that this action was dictated by specifications of the contract bid which it had been awarded. The Board disagreed and found that the employer had violated Section 8(a)(5) by unilaterally removing a bargaining unit position from the unit and reclassifying it as a non-unit position. *Wackenhut Corp.*, supra. *Catalina Pacific Concrete Co.*, supra. (unilateral removal of batch operators from the bargaining unit without notice and an opportunity to bargain with the union violated Section 8(a)(5).

The facts in this case are similar to those in *Hampton House* and *Wackenhut*. Respondent eliminated the route supervisor position without giving notice and an opportunity to bargain to the Union. Simultaneously, Respondent created new District Sales Manager positions, vesting them with supervisory authority while including in their responsibilities the duties which had been performed by the route supervisors. This fact is undisputed as Respondent stipulated that it transferred the duties formerly performed by the route supervisors to the new district sales manager position. The only real change from the old position to the new that I can discern from the evidence is that the new position would have the authority to hire, fire and discipline employees whereas the old route supervisor position did not have that authority, at least with respect to the Union route supervisors. Otherwise, the job duties would remain the same, though emphasis on which duties were to be performed might change.

Further, Respondent retained five former Union route supervisors as district sales managers who are still represented by the Union and are paid pursuant to the union supervisor collective bargaining agreement. These five currently perform the same duties they had performed as Union route supervisors under a virtually identical job description as that of the non-union district sales managers. Only the authority to hire, fire and discipline has been withheld from these five employees. Thus, the key fact has been established that Respondent eliminated unit positions and transferred unit work to non-unit positions. As in *Hampton House* and *Wackenhut*, it is the removal of unit work from the unit that constitutes the violation. It is no defense that the work is now being done by statutory supervisors. An employer's right to

promote employees must be distinguished from an abolishment of jobs performed by unit employees and transfer of their work to non-unit employees. *Hampton House*, supra, at 1005.

Respondent did not negotiate with the Union concerning either its decision to eliminate the route supervisor position and the transfer of its duties to non-unit district sales managers, or the effects of that decision on unit employees. Further, Respondent did not provide the Union with notice and an opportunity to bargain about its proposed change.

It is evident that Respondent gave no consideration to its bargaining obligation with the Union in making this unilateral change. Respondent planned a restructuring of its management team as a part of a business plan to remove itself from bankruptcy. The plans included the elimination of 742 division sales managers (union and non union route supervisors) nationally. Only a small portion of these positions were represented by a union, including the 24 route supervisors in New England. It is evident that Respondent gave virtually no thought to the ramifications of its restructuring decision on its union-represented employees, concentrating as it was on the national scope for its restructuring plans. Indeed, Jane Miller herself admitted that failing to bargain with the Union on this issue may have been an oversight.

Miller defended Respondent's failure to provide notice and an opportunity to bargain by stating its decision was management reorganization and, thus, Respondent had no such obligation. Her contention misconstrues Respondent's liability under the law. As noted below, while Respondent may have believed its union route supervisors to have been statutory supervisors, I have found that belief to be in error as set out at length above. Further, as found above, even if Respondent were right and the route supervisors were statutory supervisors, that is no defense to a unilateral change under the principles of *Gratiot Community Hospital*, supra. Similarly, Respondent cannot reasonably argue that its decision to eliminate the union route supervisor positions and transfer their duties to non-unit supervisory positions was not amenable to collective bargaining. Rather, the Union had an inherent interest in the duties of the bargaining unit and had the ability to bargain concerning them, if given the opportunity to do so. The facts of this case further demonstrate this point.

Prior to September 11, Respondent planned to eliminate all 24 union route supervisor positions and transfer their duties to non-union district sales manager positions. This changed when Union officer Padellaro, while demanding bargaining over Respondent's action, informed Joe Landry on the 11th that Respondent would incur pension withdrawal liability if it eliminated all of the unit positions. Padellaro's statement caused Respondent to reassess its position. Padellaro apparently had offered information to Respondent which it had failed to consider in making its decision to eliminate all unit positions. Thus arose the MEPPA issue referred to in Respondent's emails of September 11 and 12. The fact that Respondent actually altered its decision based on information provided by the Union demonstrates, beyond a doubt, that the matter was amenable to collective bargaining.

Respondent's response to Padellaro's raising the MEPPA issue was to determine that some of the route supervisors had to remain in the bargaining unit to avoid a pension withdrawal liability. No definitive explanation of how it was determined that that number would be five can be found in the record. Emails and oral testimony show that Respondent considered retaining as few as 2 union route supervisors to as many 13. No explanation of how it was determined which route supervisors would be offered the opportunity to remain in the Union was given in the record. Clearly, these two subjects were obviously amenable to collective bargaining. If given the opportunity, the Union might have offered numerous other proposals which could have caused Respondent to further revise its plan. Yet Respondent failed and refused to offer the Union that opportunity. In doing so, it violated the Act.

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In addition, Respondent admitted that its decision to eliminate the route supervisors positions saved it some portion of \$14.6 million in labor costs. That labor costs were a factor in Respondent's decision further demonstrates that the issue was amenable to collective bargaining.

6. Did Respondent Give Adequate Notice and an Opportunity to Bargain to the Union?

Respondent did not engage in bargaining with the Union regarding its decision to eliminate the route supervisor positions in New England or about the effects of that decision upon unit employees. Respondent further failed to provide the Union with notice and an opportunity to bargain about the elimination of the route supervisor position and the transfer of its duties to non-unit district sales managers. I do not find that an inference that could be drawn based on a chart contained in an 800 page document given to the Union amounts to actual or constructive notice that Respondent intended to eliminate the Union route supervisors position.

The burden is on Respondent to show that the Union received actual or constructive notice of its proposed changes. *Catalina Pacific Concrete Co.*, supra. To establish a claim that the Union waived its right to bargain, it must be shown that notice was given by Respondent in a meaningful manner at a meaningful time. *Metropolitan Electronics*, 279 NLRB 957 (1986). "An employer must inform a union of its proposals under circumstances which at least afford a reasonable opportunity for counter arguments or proposals." *Defiance Hospital*, 330 NLRB 492 (2000), citing *NLRB v. Centra*, 954 F.2d 366 (6th Cir. 1992). Where this has not occurred, the question of union waiver of its rights is not raised. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *S & I Transportation*, 311 NLRB 1388, 1390 (1993).

The sole evidence of any alleged notice being given to the Union in this case comes from Respondent's June 14 meeting with national representatives of the Teamsters, at which Jane Miller made a presentation. Miller described her presentation as a proposal, a statement supported by the document itself which reads on its face "for discussion purposes only." As of June 14, Respondent had made no final decision concerning that proposal. The final decision to eliminate the route supervisor position was not made until the end of June.

During her June 14 presentation, Miller showed a voluminous document which purports to show route sale representatives in a reporting relationship to the district sales managers. By this document Respondent contends it was evident to anyone "familiar with their organization" that the division sales manager position was being eliminated. The document, which was not provided to the Union, admittedly does not explicitly state this fact. Miller claimed that she orally informed those in attendance that Respondent was eliminating the division sales manager position. For the reasons set out in the factual portion of this decision, I do not believe this assertion and do not credit it.

An additional reason I do not credit her assertion is that Respondent went to great lengths to hide its intention to make this change and the date it intended to implement the change. The very first indication to employees affected and the Union came in a written letter to employees given out on the date of implementation. Significantly it was not sent to the Union. The first the Union heard about the change was from affected route supervisors who were told to be at a meeting. Even when the Union inquired about the purpose of the meetings, it was stonewalled. Notice of the change took place simultaneously with implementation and the Union was presented with a faux accompli. I find from the evidence that Respondent did not intend for the Union to know of the change until implementation and did not give any kind of notice sufficient to legally put the Union on notice of the change. Clearly the Union did not waive

its right to demand bargaining, and indeed, upon Padellaro's learning of the proposal, he demanded bargaining. Respondent has thereafter refused to comply with this request. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001).

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7. Does Respondent's Reliance on *First National Maintenance Corp. v. NLRB have Merit?*

Respondent contends that its action in eliminating the union route supervisor position and transferring its duties to the non-unit district sales manager position was privileged under the Supreme Court's decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). In First National Maintenance, the Supreme Court analyzed whether management decisions were mandatory subjects of bargaining, dividing them into three categories. The first category consists of management decisions, such as choice of advertising, product type and design, and financing arrangements, which "have only an indirect and attenuated impact on the employment relationship." For those types of decisions, there is no obligation to bargain. In the second category are management decisions, such as the "order of succession of layoffs and recalls, production guotas, and work rules," which are almost exclusively "an aspect of the relationship between employer and employees." As to these decisions, there is an obligation to bargain. The third category consists of management decisions which have a direct impact on employment, such as the elimination of jobs, but which have as their focus the economic profitability of the business. The Court stated that these decisions involve a change in "the scope and direction of the enterprise" and are akin to the decision whether to be in business at all, citing Fibreboard Corp. vs. NLRB, 379 U.S. 203, 223 (1964). For those decisions, the Court held that bargaining would be required "only if the benefit, for labor management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." First National Maintenance, supra, at 676-679.

Respondent's decision in this case was to eliminate union route supervisor positions and transfer their duties to non-unit district sales managers. The key fact is that this action by Respondent was admittedly part of a large management restructuring. As such, it does not lie within the third category of decisions which involve a change in the scope or nature of the business. Jane Miller admitted that there was no change in the nature of Respondent's business by this management restructuring. Respondent continues to bake, deliver and sell its bread and cake products in the same manner it always has. The only new duties the unit route supervisors were given by the change was the hiring, firing and discipline of employees. All their other duties remained the same, with some change in emphasis on which of those duties they spent the most time carrying out. Even after the change, virtually all the discipline meted out by the new district sales managers came only after conferring with the next higher level of management and was given with that level of management present at the meeting in which discipline was given.

Though Respondent's top management envisioned implementing a "Path to Market" system of delivering goods to customers, utilizing newer computer equipment and technology, and a new fleet of trucks, nothing really changed in the route supervisor position. Of course, other than eliminating the unit route supervisor position for 80% of the New England unit route supervisors, and eliminating the old district supervisor position, none of the Path to Market changes have occurred because of financing difficulties. The implementation of the majority of the changes is now envisioned for some uncertain future date or dates. Thus, Respondent's action amounted to no more than a transfer of work out of the supervisors bargaining unit under the guise of management restructuring. As noted earlier, the elimination of the unit route supervisor position and the old district sales manager position did result in labor cost savings amounting to some \$14.6 million. Some portion of this savings is attributable to the elimination

of route supervisor positions in New England.

Even if the total Path to Market program had been implemented, the job of the route supervisor would remain relatively the same. The person filling that job, regardless of the job's title, would be the same as before, except for hiring, firing and discipline. I believe that the decision here falls within the second category of decisions discussed in *First National Maintenance*, that is, those decisions that relate to an aspect of the relationship between employer and employee. The issue here is similar to that raised in *Holmes and Narver*, 309 NLRB 146 (1992). There, the Board found an employer violated Section 8(a)(5) when, in a reorganization, it combined jobs, reassigned work and laid off employees without bargaining with the union. The Board rejected the employer's *First National Maintenance* defense. The Board found that the layoffs were made in connection with a decision to perform the same work with essentially the same technology but to do it with fewer employees by giving some employees additional work assignments. This decision, the Board found, did not involve a change to the scope and nature of the business akin to a decision as to whether to be in business at all under *First National Maintenance*.

Like *Holmes and Narver*, Respondent here has not abandoned a line of business, ceased a contractual relationship with a particular customer, or made any other change that significantly altered the scope and direction of its business. Respondent admits that the duties of the route supervisor continue to be performed by the district sales managers. The only difference is that only five out of twenty four are still represented by the Union. Like *Holmes and Narver*, Respondent's action here amounts to no more than a work reassignment, which is a mandatory subject of bargaining. See also *Cincinnati Enquirer*, 279 NLRB 1023 (1986)(phasing out job duties by transferring those duties to others, which resulted in the elimination of unit position, is a mandatory subject of bargaining.

As the Board further found in *Holmes and Narver*, the decision at issue here is a mandatory subject because the decision was "closely analogous to . . . situations within the traditional framework of bargaining." *Holmes and Narver*, supra, at 147, citing *Fibreboard Corp. v. NLRB*, 379 NLRB 203, 224(Stewart, J. concurring). One of the "situations" which Justice Stewart identified as constituting a traditional bargaining subject was "assignment of work among potentially eligible groups within the plant." Id. This situation falls within that envisioned by Justice Stewart. The job elimination of the route supervisors were the direct outcome of Respondent's decision to transfer bargaining unit work to non-unit district sales managers. *Holmes and Narver*, supra at 148. As such, it is a mandatory subject of bargaining.

Even assuming arguendo, that the Respondent's decision falls within the Supreme Courts third category of decisions under *First National Maintenance*, the same result would follow. As the Board held in *Holmes and Narver*, the Respondent's decision here did not involve capital investment, but did, as described above involve labor cost considerations and its decision was clearly amenable to collective bargaining. Respondent saved considerable labor costs by virtue of its reorganization. It is entirely conceivable that the Union could have addressed some of those needs in bargaining. Moreover, Respondent's prompt, but unilateral, response to the MEPPA issued raised by Padellaro on September 1 was to decide to retain five district sales managers in the unit, rather than eliminate the entire unit. This action demonstrates conclusively that the issue was amenable to collective bargaining. It is evident that there were other aspects to Respondent's action which could have been addressed through bargaining. Among those aspects would have been bargaining regarding the number of district sales managers to remain in the unit, the identity of those individuals, and the process by which those individuals would be selected. The Union was denied the opportunity to bargain any such issues with Respondent. If one were to apply the weighing test dictated by the Supreme Court,

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clearly in the circumstances present by the fact of this case, the benefit for labor management relations and the collective bargaining process clearly outweigh the burden placed on the conduct of the business. Respondent has made no case at all why it was necessary to the business to eliminate any or all of the unit route supervisor positions. Indeed, the fact that it unilaterally chose to retain five such supervisors in unit district sales manager positions belies both the urgency and need to eliminate the rest without bargaining regarding this decision.

8. Did Respondent Fail to Bargain with the Union about the Effects of its Decision?

It is clear that the Union demanded bargaining several times on September 11 and 12 regarding Respondent's elimination of the route supervisor positions. There is no dispute that Respondent failed to bargain with the Union regarding both its decision to eliminate route supervisor positions and the effects of that decision. In *First National Maintenance*, supra, the Supreme Court held that, even where an employer has made a decision that falls outside the scope of being a mandatory subject of bargaining, the employer is still obligated to engage in bargaining about the effects of its decision in a meaningful manner and at a meaningful time or the Board may impose sanctions upon it to insure its adequacy. *First National Maintenance*, supra, at 681-682. Accordingly, if it is ultimately found, contrary to my findings, that Respondent was privileged not to bargain with the Union regarding its decision to eliminate the route supervisor position and transfer its duties outside of the unit, Respondent still violated Section 8(a)(5) by failing to bargain with the Union regarding the effects of its decision upon the bargaining unit employees.

9. Did Respondent Unlawfully Engage in Direct Dealing with its Employees?

The Act requires employers to meet and bargain with the exclusive bargaining representative of its employees. An employer who deals directly with its unionized employees regarding terms and conditions of employment violates Section 8(a)(5) and (1). *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). Direct dealing need not take the form of actual bargaining, but, rather, occurs whenever the employer's conduct in dealing with employees is likely to erode the Union's position as exclusive representative. *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992). In *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1118, 1120 (1997), the Board found that an employer engaged in direct dealing with employees by unilaterally revising their job descriptions and presenting them to the employees for signature, thereby by-passing the union.

Respondent engaged in just such direct dealing in this instance. Respondent met individually with each of the 24 represented route supervisors on two occasions. Union representatives were not informed of, or invited to, these meetings. The matters discussed in the meetings, as previously discussed, constituted mandatory subjects of bargaining. Respondent discussed terms and conditions of employment with the employees and solicited them to accept non-unit positions. Some employees were offered the option of accepting the new district sales manager position while remaining represented by the Union; others were not given this option. The determination of the number of these offers and the individuals to which they were made was done solely by Respondent with no input from the Union. Finally, all employees accepting the new district sales manager position whether or not they remained

⁵ The fact that Padellaro, by his refusal to be turned away, was able to attend one of the 24 individual employee meetings does not warrant a different result. Respondent held 24 meetings at the same time in several different locations. No union representatives were notified, invited to, or attended the other 23 meetings.

represented by the Union, were required to sign acceptance letters memorializing their agreement to accept the new position and the terms and conditions of the position. This was done without notice and an opportunity to bargain being given to the Union.

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These facts establish that Respondent engaged in direct dealings with employees during the meetings on September 11 and 12. *Bozeman Deaconess Hospital*, supra. To inform employees that their jobs were eliminated and offer them new positions, with only some being offered the chance to remain in a Union represented position, strikes at the heart of the collective bargaining relationship. This is particularly so where the number and identity of employees who remain represented by the Union was determined solely by Respondent. Where employees are represented by a union, it is not for the employer to decide which employees will remain in positions represented by the union. Respondent's direct dealings with its employees especially undermined the Union where it was conducted in conjunction with a unilateral transfer of union work. By meeting individually with employees on these matters without the Union's participation, Respondent unlawfully engaged in direct dealing with its employees.

10. Did Respondent Unlawfully Fail and Refuse to Provide the Union with Requested Information?

When a union has a duty under a collective bargaining agreement to represent employees, it is entitled under the Act to relevant and necessary information that will aid it in performing its representative and statutory duties. *Walter N. Yoder & Sons*, 270 NLRB 652 (1984). These responsibilities include: (1) monitoring compliance and effectively policing the collective bargaining agreement; (2) enforcing provisions of a collective bargaining agreement; and (3) processing grievances. *American Signature, Inc.*, 334 NLRB 880, 885 (2001). The Act requires and employer, upon request, to furnish the union representing its employees with information which is potentially relevant and useful to the union in discharging its statutory responsibilities, and necessary to administering and policing an existing collective bargaining agreement. *NLRB v. Acme Industrial*, 385 U.S. 432, 435-438 (1967).

Certain types of information pertaining to wages, hours and working conditions of unit employees are considered "so intrinsic to the core of the employer-employee relationship [as to be] considered presumptively relevant." *San Diego Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). Such information includes "[i]nformation that bears directly on the negotiation or administration of a bargaining agreement. *Kelly Springfield Tire*, 266 NLRB 587, 592 (1983). Where information is considered to be presumptively relevant, no specific showing of relevance is required, and the employer has the burden of proving lack of relevance. *Grand Rapids Press*, 331 NLRB 296 (2000).

However, when a union seeks information concerning matters outside the bargaining unit, the union is required to make a showing of relevance and necessity. See e.g., *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997). But the burden of establishing relevance and necessity "is not an exceptionally heavy one, requiring only that a show be made of a 'probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Id. quoting *NLRB v. Acme Industrial Co.*, supra.

Information that aids a union in the processing of a grievance, including aiding in the decision as to whether to proceed with the grievance in the first place, is considered relevant and necessary. *U.S. Postal Service*, 337 NLRB 820, 822 (2002). The Board's standard, in determining which request for information must be honored, is a liberal, discovery-type standard. *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979). The Board, in

determining that information is producible, does not pass on the merits of the grievance underlying the request and the union is not required to demonstrate that the information sought is accurate, non-hearsay, or even ultimately reliable. *W.L. Molding Co.*, 272 NLRB 1239 (1984).

In *Hampton House*, 317 NLRB 1005 (1995), the employer unilaterally transferred employees from unit positions to non-unit supervisory positions. The union grieved this action and requested information relating to the job transfer. The employer refused to provide the information, contending at trial that the information related to supervisors who were not in the unit. The Board found that the information was relevant to the processing of the grievance filed by the union and that the employer's refusal to provide the information violated Section 8(a)(5).

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The Union made two information requests which are at issue in this case. Both requests were for information relating to Respondent's unilateral elimination of unit positions. The first request was an oral information request made by Padellaro to Landry during the meeting with McCaskill on September 11.⁶ Padellaro requested information concerning when the route supervisors whose jobs were being eliminated would receive their earnings guarantees required under the collective bargaining agreement. The Union subsequently filed a grievance regarding Respondent's failure to pay the affected route supervisors their contractual earnings guarantee. Clearly, a response to the inquiry as to when the guarantee would be paid would have been an aid to the union in determining whether to file and proceed with the grievance. Respondent's failure to provide the information violated Section 8(a)(5). *Hampton House*, supra; *United Postal Service*, supra.

With respect to the second request, about September 12, Padellaro asked Joe Cabral for a copy of the paperwork signed by route supervisor George Englert in his individual meeting with Respondent regarding the elimination of his position. Padellaro explained that Englert felt he had signed under duress and without getting a full explanation of what was happening. Cabral refused to provide the requested information, stating that Padellaro was not entitled to the information as it related to a non-unit position. Englert thereafter filed a grievance regarding his job elimination. The paperwork he signed in that regard is highly relevant to the investigation and processing of his grievance. Respondent's refusal to provide the information violates Section 8(a)(5). Hampton House, supra; United States Postal Service, supra.

Cabral's and thus Respondent's refusal to supply this information on the grounds that it relates to a non-unit position is misplaced. First, it is the transfer of Englert from a unit to a non-unit position that is at issue in the underlying grievance. Where its action is in violation of the contract, Respondent cannot claim information relating to its action is irrelevant because it resulted in an employee leaving the unit. Second, at the time he signed the paperwork, Englert was still an employee within the unit and covered under a collective bargaining agreement. Even if Cabral were correct that the information requested related to a non-unit position, his refusal to provide the information was not privileged. The Union has demonstrated the relevance of its request to its grievance concerning whether Englert's transfer from a unit into a non-unit position was in violation of the collective bargaining agreement. *Public Service Electric & Gas Co.*, 323 NLRB 1182 (1997).

Conclusions of Law

1. The Respondent, Interstate Brands Corporation, is an employer engaged in

⁶ I find that Padellaro made this request. Landry did not testify and there is no evidence contradicting Padellaro's testimony in this regard.

commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, New England Teamsters Bakery Drivers Council, a/w International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

- 3. The Respondent has violated Section 8(a)(1) and (5) of the Act by:
 - a. Unilaterally eliminating the position of route supervisor, or division sales manager, and transferring the duties performed by route supervisors to non-unit district sales managers without providing notice and an opportunity to bargain to the Union.
 - b. Bypassing the Union and engaging in direct dealing with Union represented employees concerning wages, hours, and other terms and conditions of employment.
 - c. Refusing to provide the Union with information which was relevant and necessary for the performance of its duties as the exclusive collective bargaining representative of the Unit.
- 4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent should be ordered to, on request, bargain with the Union as the exclusive representative of the employees in the bargaining unit described at page 2 of this decision. concerning the terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. Respondent should further be ordered, if requested by the Union, to revoke and cease using the employee classification district sales manager, and return to the Unit all employees who were promoted to this classification or accepted positions in another unit in lieu of accepting a position as district sales manager.⁷ Respondent should be ordered to restore the position of route supervisor as a bargaining unit position and restore to the route supervisor position the duties unilaterally transferred from that position to district sales managers in September 2007. Respondent should also be ordered to make whole the routes supervisors for any loss of earnings and other benefits, with interest, suffered as a result of Respondent's unlawful unilateral change in eliminating their positions and, to the extent that the route supervisors lost coverage for various benefits provided under the collective bargaining agreement, reimburse them for any expenses incurred as a result of their noncoverage. The Union should also be reimbursed for any payments due to Union pension and other benefit funds on behalf of the employees affected by Respondent's unlawful actions. See F.W. Woolworth Co., 90 NLRB 289 (1950); New Horizons for the Retarded, 283

⁷ Though this remedy and proposed order could be construed as having effect broadly, it is intended only to apply to Respondent's employees who were in the Unit covered by the New England Supervisors Agreement and no other employees.

⁸ General Counsel seeks a remedy that calls for compound interest. This is a policy decision Continued

NLRB 1173 (1987); *Ogle Protection Service*, 183 NLRB 682 (1970); *Kraft Heating & Plumbing*, 252 NLRB 891 fn. 2 (1980). Respondent should be further ordered to furnish the Union with the information requested by the Union in September, 2007. Finally, Respondent should be ordered to post an appropriate notice to employees.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended9

ORDER

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The Respondent, Interstate Brands Corporation, Kansas City, Missouri, and as pertinent to this case, Biddeford, Maine, its officers, agents, successors, and assigns, shall

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1. Cease and desist from bargaining in bad faith with the Union, New England Teamsters Bakery Drivers Council, a/w International Brotherhood of Teamsters, by:

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a. Failing and refusing to bargain collectively, on request, with the Union, as the exclusive collective bargaining representative of all employees in the bargaining unit described below, with respect to wages, hours of employment, and other terms and conditions of employment. The appropriate collective bargaining Unit is:

All supervisors covered by the "New England Supervisors Agreement," including

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all supervisors employed out of the Employer's New England facilities (those facilities in Maine, New Hampshire, Vermont, Massachusetts, Connecticut and parts of New York State), including Supervisors, Foremen, Direct Supervisors, or other such Employees who have charge of a certain number of routes, and who perform the functions and duties of a supervisor as such functions and duties are commonly understood, but who may be designated by some other title. The unit excludes those who have the responsibility and obligation to hire and fire, and those who perform no supervisory

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duties other than route building.

b. Unilaterally eliminating the position of route supervisor from the Unit without giving notice and an opportunity to bargain to the Union and by reclassifying employees (route supervisors) into non-Unit supervisory positions (district sales managers).

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c. Unilaterally transferring the duties performed by route supervisors to non-Unit supervisory positions without giving notice and an opportunity to bargain to the Union.

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d. Failing and refusing to provide to the Union information which is reasonable, relevant and necessary to its performance of its function as the exclusive collective bargaining representative of the employees in the appropriate collective bargaining Unit described above.

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e. Bypassing the Union and engaging in direct dealing with employees in the Unit

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that should be made by the Board and can be raised by General Counsel on appeal.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

concerning wages, hours, and other terms and conditions of employment.

f. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act:

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a. On request, bargain with the Union as the exclusive representative of the employees in the bargaining Unit described above, concerning the terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed document.

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b. If requested by the Union, revoke and cease using the employee classification of district sales manager, and return to the Unit all employees who were promoted to this classification or accepted positions in another unit in lieu of accepting a position as district sales manager.

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c. Restore the position of route supervisor as bargaining unit position and restore to the route supervisor position the duties unilaterally transferred from that position to district sales managers in September 2007.

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d. Make whole the route supervisors for any loss of earnings and other benefits, with interest suffered as a result of Respondent's unlawful unilateral change in eliminating their positions and, to the extent that the route supervisors lost coverage for various benefits provided under the collective bargaining agreement, reimburse them for any expenses incurred as a result of their noncoverage, and make whole the Union and its benefit funds for any losses of contributions suffered by Respondent's unlawful actions.

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e. Furnish the Union with the information requested by the Union in September, 2007.

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f. Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

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g. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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h. Within 14 days after service by the Region, post at its Biddeford, Maine facility, on its intranet website, and at all facilities where employees in the involved bargaining unit work, copies of the attached notice marked "Appendix." Copies of the notice, on

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¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the Continued

forms provided by the Regional Director for Region One, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted, including its intranet website. Reasonable steps shall be taken by the Respondent to ensure that the notices are 5 not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 25, 2007. 10 i. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. 15 Dated, Washington, D.C. October 27, 2008 Wallace H. Nations 20 Administrative Law Judge 25 30 35 40 45

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National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain in good faith with the Union, New England Teamsters Bakery Drivers Council, a/w International Brotherhood of Teamsters in the following appropriate Unit:

All supervisors covered by the "New England Supervisors Agreement," including all supervisors employed out of the Employer's New England facilities (those facilities in Main, New Hampshire, Vermont, Massachusetts, Connecticut and parts of New York State), including Supervisors, Foremen, Direct Supervisors, or other such Employees who have charge of a certain number of routes, and who perform the duties of a supervisor as such functions and duties are commonly understood, but who may be designated by some other title. The unit excludes those who have the responsibility and obligation to hire and fire, and those who perform no supervisory duties other than route building.

WE WILL NOT refuse to bargain in good faith with the Union by unilaterally eliminating the position of route supervisor from the Unit and by transferring the duties performed by route supervisors to non-Unit district sales managers.

WE WILL NOT unilaterally transfer the duties performed by route supervisors to non-Unit supervisory positions without giving notice and an opportunity to bargain to the Union.

WE WILL NOT bypass the Union and engage in direct dealing with our Union represented employees concerning wages, hours, and other terms and conditions of employment.

WE WILL NOT refuse to bargain in good faith with the Union by refusing to supply information that the Union requested in September 2007.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of your rights guaranteed you under Section 7 of the Act.

WE WILL, if requested by the Union, revoke and cease using the employee classification of district sales manager, and return to the Unit all employees who were promoted to this classification or accepted positions in another unit in lieu of accepting a position as district sales manager.

WE WILL restore the position of route supervisor as a bargaining unit position and restore to the route supervisor position the duties unilaterally transferred from that position to district sales managers in September 2007.

WE WILL make whole the route supervisors for any loss of earning and other benefits, with interest, suffered as a result of our unlawful unilateral change in eliminating their positions and, to the extent that the route supervisors lost coverage for various benefits provided under the collective bargaining agreement, reimburse them for any expense incurred as a result of their noncoverage.

WE WILL furnish the Union with the information that it requested in September 2007.

WE WILL notify and, upon request, bargain with the Union as the exclusive bargaining representative of our employees in the Unit prior to making any changes in wages, hours or other terms and conditions of employment.

	_	INTERSTATE BRANDS CORPORATION	
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072 Hours of Operation: 8:30 a.m. to 5 p.m. 617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.